2-327

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 622.

CHARLES K. BROWN, SURVIVOR, ETC., PLAINTIFF IN ERROR,

vs.

FRANK S. ATWELL, ADMINISTRATOR OF ISAIAH SCOTT, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED SEPTEMBER 30, 1875.

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1 Supreme court.

ISAIAH SCOTT, PLAINTIFF,
agt.
CHARLES K. BROWN, SURVIVOR, &C., DEFENDANT.

To A. K. Hadley, esq., plaintiff's attorney, and E. W. Greenman, clerk Rensselaer County:

Take notice that the defendant, Charles K. Brown, above named, hereby appeals to the supreme court, at general term, from the judgment herein, entered in the Rensselaer County clerk's office, on the first day of August, 1871, in favor of said plaintiff against said defendant, and from every part of said judgment.

Dated Troy, August 14, 1871.

G. B. KELLOGG,
Defendants' Attorney, Troy, N. Y.

Summons.

2 Supreme court, Rensselaer County.

ISAIAH SCOTT
agst.
CHARLES K. BROWN AND SAMUEL S. STONE.

To the above-named defendants:

You are hereby summoned to answer the complaint of the above-named plaintiff, which will be filed in the office of the clerk of Rensselaer County, and to serve a copy of your answer on us at our office in the city of Troy, within twenty days after the service of this summons, exclusive of the day of service; and if said defendants fail to answer said complaint, as hereby required, the plaintiff will take judgment against said defendants for eight thousand dollars, with interest thereon from the 11th day of September, 1856, besides costs.

Dated September 11th, 1856.

MILLARD & KING,
Plaintiff's Attorneys, Troy, N. Y.

Complaint.

Supreme court, Rensselaer County.

ISAIAH SCOTT
agst.
CHARLES K. BROWN AND SAMUEL S. STONE.

The above plaintiff complains of the above-named defendant', and alleges that one Charles Neer, on or about the 20th July, 1853,
3 was the owner of a patent, or letters-patent, of the United States, for a certain improvement in fire-places and stoves, which letters-patent bore date on or about the 1st day of May, 1853.

That said Neer, being so the owner of said patent, on or about said 20th July, 1853, duly assigned and transferred to said plaintiff all his

interest, right, and title therein, and the same then became, and has ever since been, owned by said plaintiff, and is still owned by him.

That the defendants were in business in Troy as partners, or otherwise engaged in the sale of patent-rights, and having made sales of the said patent while it was owned by said Neer, they continued to do so after said transfer to said plaintiff, and, as plaintiff alleges, made large sales to various persons in the New England States and elsewhere, amounting to $10,000 and upwards, and although said plaintiff has repeatedly called upon said defendants to account to him therefor, and pay over to him the proceeds thereof, yet said defendants have refused so to do.

Wherefore, said plaintiff demands judgment against said defendants, that they account, and that an account be taken of sales of said rights made by them in the New England States or elsewhere, and that said defendants may be adjudged to pay to said plaintiff what upon the taking of said account and accounting shall be found to be due said plaintiff, which he claims to be eight thousand dollars, besides costs of this action.

MILLARD & KING,
Plaintiff's Attorneys, Troy, N. Y.

Answer.

4 Supreme court.

ISAIAH SCOTT
agt.
CHARLES K. BROWN AND SAMUEL S. STONE.

The defendants, Charles K. Brown and Samuel S. Stone, answering the complaint of the plaintiff in this action, deny each and every allegation in said complaint contained; and the defendants further deny that the plaintiff is entitled to the relief asked for in said complaint, and claim judgment for their costs.

KELLOGG & PERCY,
Defendants' Attorneys, Troy, N. Y.

At a special term of the supreme court held in and for the State of New York, at the chambers of the Hon. C. R. Ingalls, in the city of Troy, on the 27th day of December, 1870—

Present, Hon. C. R. Ingalls, justice.

Order of reference, &c.

ISAIAH SCOTT
agst.
CHARLES K. BROWN, SURVIVOR OF DEFENDants Charles K. Brown and Samuel S. Stone.

On reading and filing a stipulation in this action, signed by the attorneys for the respective parties, by which it is agreed that the death of said Stone be suggested on the record, and that this action proceed against said Brown as survivor of said defendants, Brown & Stone;
5 that the order heretofore entered in this action referring the issues therein to the Hon. Charles C. Parmelee be vacated, and that this action and the issues therein be referred to Charles F. Tabor,

esq., to hear and determine the same, and that on filing this stipulation an order may be entered by either party without notice to the effect as above stipulated; and on motion of Giles B. Kellogg, surviving attorney for the defendant Brown, survivor as aforesaid, it is ordered that the suggestion above mentioned be entered on the record, and that this action be, and the same hereby is, referred and continued against the said Brown, as survivor as aforesaid, and the order heretofore entered vacated in compliance with the terms of said stipulation.

C. R. INGALLS,
Jus. Sup. Court.

Referee's report.

Supreme court.

ISAIAH SCOTT
against
CHARLES K. BROWN, SURVIVOR, &C.

I, Charles F. Tabor, sole referee, appointed in this action for certain purposes specified in the order of appointment, having heard the proofs and allegations of the parties, and the arguments of the counsel, do find the following facts:

Charles Neer was the patentee and owner of a patent fire-place air-heater and grate, the patent whereof was issued to him May 31st, 1853.

On the 23d of October, 1854, he gave a power of attorney to Samuel S. Stone, to sell and convey territorial rights to this patent.

6 Under this power Stone made four sales, two to parties at Detroit, Michigan, in the fall of 1855—one of them to Robert R. Wallace, the other to Leland Crandall; and two to parties in the State of Massachusetts, one of that State made on the 6th of March, 1856, and the other of the other New England States, made on the 16th of June, 1856.

These several sales were for sums considerable in amount, and were made for money and property, a part of which has been paid and delivered.

A few days previous to June 30, 1856, Neer revoked Stone's power of attorney, and renewed it again July 3, 1856. The defendant used his influence with Neer to induce him to make this renewal; and it was understood that it was made only for the purpose of completing the last-mentioned sale, then not fully completed.

Stone was the defendant's agent for the sale of these rights. Hubbard and Campbell, mentioned in the testimony, were in defendant's employ under Stone. The power of attorney was given to Stone as defendant's agent. This I find principally from the acts, admissions, and declarations of the defendant. It was made to him as a convenient way of doing the business, as Stone was to do the traveling.

The contract or agreement between Neer and the defendant was not proved in detail, if there ever was one, except as growing out of the acts of the parties and the manner in which the business was transacted, as to which I do not find; and there was a conflict, so far as there was any evidence given upon the subject, as to how the proceeds of the sales of the patent were to be divided. The plaintiff gave some testimony to prove that he was entitled to one-half thereof, and according to that of the defendant he was entitled to one-quarter only. It was admitted that it was usual and customary for parties to divide

7 equally the proceeds of sales of patent-rights between the owner

and vender. Neer consented to, and actually made, a division or partial division of the proceeds of the two first or western sales, upon the basis that the plaintiff was entitled to one-fourth only, but afterwards manifested dissatisfaction, and refused to go on with the arrangement, unless he was paid one-half the proceeds of sales, and that one-half was to be paid is corroborated by other testimony.

Neer sold and conveyed an undivided half of this patent to Morrisson, July 18, 1853, and soon thereafter, and before the execution of the power of attorney to Stone, Morrisson gave Neer a contract of agreement in writing, by which Neer was authorized to manufacture and sell the heater and grate and rights, and was entitled to the proceeds of such sales the same as if no sale had been made to him.

On the 20th of July, 1855, Neer sold and conveyed this patent to the plaintiff; and on the 23 of July, 1855, took from him a power of attorney to sell and dispose of rights under the same.

Morrison conveyed his interest in the patent to the plaintiff August 28th, 1856.

At the times of the several sales made by Stone as specified, the plaintiff was the owner of said patent, subject to the interest, if any remaining in Morrisson, conveyed by him to the plaintiff as stated.

The plaintiff had knowledge of these sales at or about the times when made, and how and by whom made; he did not object to them. The defendant knew about the plaintiff's ownership of the patent, or of his claim to own it, soon after the Detroit sales. Stone was informed by Neer, before closing the New England sale, that he was acting under a power of attorney from the plaintiff.

8 The conveyances to the several parties who made the purchases named were made by Stone as attorney for Neer, and each purported to convey all of Neer's right, title, and interest in and to said patent, as fully as the same would have been enjoyed by him had said sale not been made.

The New England Furnace Company, which became the owner of the rights embraced in the two sales last made, and which did something by way of manufacturing heaters, stopped operations and called upon the plaintiff to make them a good title.

On or about the 20th of November, 1857, a meeting was held of parties representing said furnace company and the parties to this action, at the city of Troy, at which meeting the plaintiff offered to give a deed, and make good the title of said company, provided the defendant and Stone would account for and pay over the plaintiff's share of what had been received by them on such sales.

A portion of the proceeds of these sales, both in money and kind, came to the hands of the defendant and said Stone, and the defendant made some payments of money to Neer on account of money received by him on such sales, and made a division with him of some of the property received from the Detroit sales, Neer acting on such division as the agent of the plaintiff, and for him.

It did not appear that the purchasers, or either or any of them, of the four several rights specified, have been disturbed in their title to said rights or the use or sale thereof, or that the defendant has refunded any money, or returned any property, received by him on account of any defect in their titles, or for any other reason.

Other facts were proved, but the foregoing are those which I deem material and controlling upon the matters referred to me.

9 Upon these facts I decide that the defendant is bound to account for the money and property received by him and the said

Stone, or either of them, on or from such sales, and that he may be required to account therefor by the plaintiff, as the owner of said patent at the times said sales were made, and who did not disaffirm, but, on the contrary, affirmed the same.

An order must therefore be entered for the taking of an account of all such money and property, and a reference had for that purpose; and upon the coming in and filing of the report of the referee upon such accounting the plaintiff will be entitled to judgment for the one-quarter of all such money so received by the defendant and said Stone, or either of them, and the value of one-quarter of all the property so received by him and said Stone, or either of them, not heretofore accounted for, or paid over to him or said Neer from the two first of said sales, made at Detroit; and for one-half of all such money and property received from the two last sales, not paid over or accounted for as aforesaid, with the interest thereon, together with his costs and disbursements.

The question as to whether Neer and Morrisson, or either of them, should have been joined as plaintiff in this action, I have not considered, but assumed that the court would, on proper application, allow both or either of them to be brought in and made parties in this action.

Dated June 5th, 1871.

C. F. TABOR, *Referee.*

10 *Judgment order.*

Supreme court.

ISAIAH SCOTT
against
CHARLES K. BROWN, SURVIVOR OF SAMUEL S. STONE.

On filing the report of Charles F. Tabor, esq., sole referee herein, and on motion of A. K. Hadley, plaintiff's attorney, it is now, pursuant to said report, ordered and adjudged that said defendant Brown do account to said plaintiff for the money and property received by him and said Stone, or either of them, from four sales of territorial rights, under letters-patent of the United States to Charles Neer, dated May 31st, 1853, for fire-place air-heater and grate, which said sales were made, one to Robert R. Wallace, one to Leland Crandall, and another of the State of Massachusetts, and the other of the New England States other than Massachusetts; that such accounting be had before a referee, to be appointed for that purpose; and that upon the making and filing of his report, said plaintiff have judgment against said Brown for one-fourth of all moneys, and the value of one-fourth of all property so received by him and said Stone, or either of them, not heretofore accounted for or paid over to said plaintiff or said Neer, from said sales to said Wallace and said Crandall, and for one-half of all such moneys and property received from the said other two sales, not paid over or accounted for as aforesaid, with interest thereon, besides the costs of this action.

11 *Case and exceptions.*

Supreme court.

ISAIAH SCOTT
agst.
CHARLES K. BROWN, SURVIVOR, &C.

This action was commenced September 11, 1856, against Charles K.

Brown and Samuel S. Stone. Said Stone died June 17th, 1866, and the action has since been continued against said Brown as survivor.

The pleadings are set forth in the judgment-roll, hereby made part of this case.

The issues therein were duly referred to Charles F. Tabor, esq., as sole referee, and the trial was had before him, and was as follows:

DEC. 27TH, 1870.

ANNES A. LINCOLN, jr., called by plaintiff, and sworn, testified as follows:

I reside in Norton, Mass. Was introduced to Brown about sixteen years ago, and recognize defendant now present as same person. Knew Samuel S. Stone.

Know of a patent fire-place or heater said to have been invented by Charles Neer.

Became acquainted with it about 1854 or '5. A man by the name of Hubbard called my attention to it, and induced me to take hold of it. This was at Norton. I was in company with Cyrus Butler, of
12 Providence, R. I., under name of Norton Furnace Company. I had two or three interviews with Hubbard, and it resulted in our agreeing verbally to give $2,000 for the right in Mass. Before the notes were given, Hubbard found it necessary to go to Troy, and Butler and I concluded I had better come to Troy to see about it, and I did. I met Hubbard at East Albany, going to Providence, and he came back to Troy with me. He took me to Brown's office and introduced me to him as his principal, and Brown said that what Hubbard had done and should do was all right, and would be ratified. Stayed there but ten or fifteen minutes; then went to Stone's house with Hubbard, and was introduced to Stone, and stayed all night.

That evening saw the letters-patent, and wanted to see the power of attorney from Neer, but they bluffed me off. At Stone's, Stone represented that Neer had nothing to do with it now; said there was a power of attorney not there; said he would send for it. Some excuse was made that Neer was sick. Next morning saw Brown a short time, and he spoke about the merits of the heater.

Next morning returned to Providence with Hubbard, and arrangement was completed and $2,000 paid, part in cash and part in notes. Neither Brown nor Stone said anything about Neer having sold his interest to Scott. The agreement between us and Hubbard was in writing, as I think.

(Above testimony as to what occurred between witness and Stone when Brown was not present was duly objected to by defendant Brown's counsel as inadmissible and hearsay as against him. The referee received same, but reserved his decision; and afterwards, when plaintiff closed his proofs, the referee decided that such testimony was admissible, and to retain and consider the same; and thereto Brown's counsel duly excepted.

13 Cross-examination:

I was ten or fifteen minutes in Brown's office the evening I arrived, but talked but very little with him; most of the conversation was with Hubbard. I had previously been informed that Neer was patentee. Brown did not in so many words say that the patent had ever been assigned to him. I have not a very distinct recollection of that conversation. About all I remember is the impression left on my mind,

and that was that I could depend upon the statements made by Hubbard about it.

I told Brown in substance that Hubbard had been negotiating with me for the sale of rights in Massachusetts for Neer's patent, and that I wanted to know who his principal was; and Brown said it was all right, and he would ratify all Hubbard did. I think I remember that Brown said that what Hubbard did would be all right and would be ratified. That was all that took place between Brown and me that I remember. I think I asked for the letters-patent and power of attorney, but whether I asked that of Brown or Hubbard I don't recollect; and I was told that I should see same up at Stone's house. I think Brown went out and left Hubbard and me there, and as he went out told Hubbard to take me up to the house.

Q. State what occurred between you and Brown the next morning.

A. I have a very indistinct recollection of it; no business done.

Q. Do you not remember that when you were at Brown's office in the evening you bought a heater and a set of patterns?

A. Yes; I had forgotten that. I bought that evening a set of castings, to be used for patterns for the Neer heater. That negotia-
14 tion was partly with Brown and partly with Hubbard. I ordered them shipped to Norton; didn't pay for them; don't remember the consideration, whether they were to go into the territory or we were to pay for them. (Witness shown paper.) It is my handwriting, and I think I made it that evening. (Introduced and marked "Exhibit I.")

Plaintiff introduced letters-patent of the United States to Charles Neer, dated May 31, 1853, for improvements in fire-places and stoves.

Also, an assignment by Charles Neer to James Morrison of an undivided half of said letters-patent. Said assignment was dated July 18, 1853, and recorded in United States Patent-Office, October 3, 1853.

Also, power of attorney from Charles Neer to S. S. Stone, dated October 23, 1854, of which Exhibit A, herein set forth, is a copy.

Also, an assignment by Charles Neer to Isaiah Scott of his (Neer's) interest in said patent, which assignment was dated July 20, 1855, and recorded in the United States Patent-Office July 26, 1855.

Also, from Charles Neer to S. S. Stone, a withdrawal of revocation of power of attorney, dated July 3, 1856, and recorded in said Patent-Office Oct. 4, 1856.

DECEMBER 28TH, 1870.

LUMAS H. HUBBARD, called and sworn for plaintiff, testified as follows:

Reside in Cleveland, Ohio; know defendant Brown; knew Stone; know Charles Neer; know about heater patented by Neer: became acquainted with it at Detroit in fall of '55 or '56—I think '55. Saw Stone about same. It was in August or September. Stone had a model there. In October or November he came back to Detroit. I was with him two or three weeks then, in Detroit and vicinity. A trade was negotiated with Robert R. Wallace, Leland Crandall, and William Camp-
15 bell. A sale of an interest in this patent was made. A deed was given. Wallace paid in clothing $350 to $500, and gave his notes for balance, making $1,500. Gave them to Stone. Crandall turned out a lot of jewelry, which was brought to Troy, but I cannot state amount the jewelry was called. A lot of copper stock was taken in the trade. Can't state amount, nor which one turned it out. Campbell was helping Stone, and I think Stone gave him a suit of clothes. I helped Stone in making this trade. After we got through

there, Stone and I went to Cleveland, and from there I went to Boston. I was before and at same time acting with Stone in sale of John Rich's patent plow.

I went to Boston. Stone came to Troy. After being in Boston a week or ten days, Stone came there. Brown and Stone sent a heater and a plow to me at Boston. We commenced negotiating for sale of heater. I had previously commenced same, and when Stone came he helped. Stone made a bargain with me to travel and sell territory for plows and heaters. After spending from December to about the 1st of March, I succeeded in getting up a trade for sale of heater for Massachusetts at Taunton, with Butler and Lincoln. Sold State of Mass. for $2,000; $200 cash, notes $1,800, and took a contract in writing for a royalty on each heater in addition. I sold it to the Dickermans (Daniel S. and John Q.) of Taunton, for $515.

Q. What did you do with the proceeds?

A. Had it shipped to Brown at Troy. A piano, two gold watches, and a lot of artificial teeth. These were taken at $465, and a set of teeth for myself, at $50, made up the $515. I accounted to Brown and Stone for the proceeds of this sale. After making this sale, we
16 sold balance of New England States for $10,000. I think purchaser was called New England Grate Co. It was consummated at Taunton, I think, in summer of '56. Payment was taken in money, notes, and property. Stone received money and notes, and the property was shipped to Brown at Troy. The negotiation was at Taunton and Providence. In making sale for Mass., when we came to complete it, they were not quite satisfied with deed I gave them. It was a printed blank deed, and signed by Stone as attorney for Neer, and they wanted a different deed, and I came to Troy in March from Providence; was here two days and started back and met Lincoln at Albany, and returned with him and saw Brown, and had a long talk. That was first time I saw Brown after commencing with Stone in fall previous; saw him during the two days I was here. Stone was not at home till late in the second day; was present at interview between Lincoln and Brown. Mr. Lincoln wanted to know whether my authority for selling was right, and came for that purpose, and wanted to know about it. In reference to deed being signed in blank, Brown said it was just as good as any other way, and Brown told Lincoln my trade was all right, and he would sustain it; would back me in what I had done; any way satisfied him.

Q. Did Brown give any reason why the power of attorney was to Stone individually?

A. Brown said it was more convenient to have the power of attorney, both for plow and heater, in Stone's name, as he travelled alone. Lincoln asked a good many questions. Brown said in case they had any difficulty they could use Stone as a witness, having the power of attorney to him. After we got through talking, we went to Brown's house, where Brown and Stone both lived; my impression is Stone
17 came home that night; at house Lincoln wanted to see power of attorney from Neer to Stone; Stone went away, and said he was going to Neer's; came back without it. He and Brown together satisfied Lincoln it was all right. Brown said he would guarantee Lincoln it was all right. Lincoln didn't see Neer. Brown didn't want either of us to see Neer. Brown told both Lincoln and me so. He said Neer had two children in insane hospital, and if he found out there was likelihood of a trade, he would get excited like all other patentees, and it would make trouble. I have stated all I think of.

Cross-examined:

First time I saw Stone was in Troy, in '51 or '52. I had business relations with him. My first relation with heater was in '55; that relation was to help him in making sales of territory. I was to have a share of the proceeds for my services; before that I had not helped him sell territory for heater. While at Detroit, in '55, I also arranged with Stone to help him sell territory for plow, and was to have a share of the proceeds; and I continued in that relation to Stone until after sale to Butler & Co., in July and August, 1856. The bargain I spoke of as made with Stone to travel and sell territory for plows and heaters was made at Detroit; that was all the bargain I made with him on that subject. The sale to Dickerman was made within a few days after receiving the contract from Butler & Lincoln; while I was at Taunton and before I came to Troy. I brought the watches and teeth with me to Troy. I had the piano shipped to Brown whilst I was at Taunton; ordered it shipped before I came to Troy; whilst at Taunton I received letters from Brown; have none of them with me. I sold the notes I took of Cyrus Butler & Co., and got two drafts on New York,
18 one for $1,000, one for $500. I brought them both to Troy with me. The drafts were made payable to me. I took them to the office of Brown, with the watches and teeth, and laid them on his desk, and Brown took them and read them, and said they were all right. I put them in my pocket, and went up to Brown's house with them; also took the watches; think the teeth were left in the office; stayed with Brown all next day, and undertook to settle with him. Stone was away, and Brown wanted me to wait till Stone came. We differed about settlement. Brown told me to keep the watches and let the drafts stand till Stone came. I kept the watches and the drafts until Stone came home, which was the second night after I came here. I kept the watches and drafts until Brown had me arrested, and then handed them to Millard & King, my counsel. The teeth were also given to them, as I think.

(Witness was shown a paper marked "Defendant's exhibit 2," and hereinafter set forth.)

I don't remember of ever seeing it, but I delivered articles as therein stated. The $200 cash I received from Butler & Lincoln I paid out for expenses, and whatever other cash I received from them I paid out in same way—in expenses connected with the business. I can't say that I was present when the sale to New England Grate Co. was consummated. I was present when some property was turned in by New England Grate Co. toward payment of its purchase. The Dickermans let Stone & Campbell have some buggies and harnesses, and, I think, one or two horses; don't remember any other; don't know what became of buggies, except what Stone and Campbell told me; nor about harnesses and horses. My business was to drum up customers, and then Stone attended to consummating the trade. I have told substance of
19 all I now recollect of what occurred at Brown's office the evening Lincoln and I were there. I should think we were there from an hour to an hour and a half.

We went up to his house with Brown when we left the office. My impression is, Stone was not at house when we got there; think he came in late in the evening. It was that evening, and I think near 9 o'clock, when Stone went out, saying he was going to see Neer. Brown and Stone lived in the same house. Brown was with us more or less that evening, but can't say whether all the evening.

The arrest I spoke of was in a suit which Brown brought against me;

that suit was tried; suppose I was sworn as a witness in it. I brought a suit against Brown in Mass. for services; it was tried in Boston. I was sworn on that trial. Neer was present at that trial part of the time; first day, I think. He was examined as a witness, I think. I got beaten in that suit, and here, too.

Re-examined by plaintiff:

Q. What did Stone say to you about payment received by him, on account of sale of New England States to New England Grate Co.?

A. Had a talk with Stone and tried to get him to settle. He admitted he had collected in notes and property all but $500 or $700. Was present when the New England Grate Co. met and agreed to take rest of patent for New England States and pay $10,000 for it. Was present also when one of the company turned over to Stone $500 in clothing. It was agreed between them there that it should be shipped to defendant Brown. I looked over goods and agreed on prices; then Stone went and approved. Hathaway took $1,000 of the company's stock, and
20 turned in piano at $350, and gave notes for balance, payable in marble.

Q. Why did you sell the notes received from Butler and Lincoln, or by whose direction?

A. By direction of defendant Brown whilst I was here in Troy; before notes were made he told me to sell them if I could. The difficulty between Brown and me was, I wanted expenses paid first and then divide net proceeds. Stone was with me about two weeks in Boston; rest of the time he was not. When Brown and I figured up, it left me, by his figures, $56 net for all my doings from November to March. I was to have one-fourth after paying expenses, and Stone one-fourth; on that we differed. Neer was to have one-half. The talk about settlement was with Brown until Stone came home.

Cross-examined:

The arrangement about my share was made with Stone at Detroit. Before this arrangement I had travelled with William Campbell for Charles K. Brown & Co., as their agent for selling plow territory. I supposed that Brown and Stone were in company in that after Brown bought out Bosworth.

Re-examined:

When I said I got beat in the suit here, I meant I didn't get anything out of it; they allowed my claims. I helped Campbell make the sale to the New England Grate Co. He was working for Brown. (This was afterwards stricken out by referee, on defendant's motion.) Campbell furnished me money for travelling expenses for that purpose.
21 While here with Lincoln, Brown gave me money to go back to Taunton. That was the same time I asked his advice about what to do with the notes to come from Butler and Lincoln. When Brown and I disagreed and he wanted me to wait for Stone, he gave as a reason that Stone was the one I made the bargain with. I had been employed directly by Brown in connection with heater before Campbell went to Taunton.

Cross-examined by defendant:

Q. When and where did Brown directly employ you as just now stated?

A. He wrote to me at Boston directly after I first went there.

Q. Just now, when the last question was asked you, did you not answer in substance that it was Stone who employed you?

A. I did.

Q. Have you any present recollection of the contents of the letter referred to?

A. I have of the first one he wrote to me in Boston; it was before he shipped the heater and plow.

Q. Do you mean to be understood that in that letter he employed you to act for him?

A. I mean that he sanctioned Stone's employment of me and gave me directions what to do both as to the plow and heater, and shipped a plow and heater to me. The first I knew of Campbell's going to Taunton was after my arrest.

Q. How do you know that Campbell had any authority from Brown to act for him as to the heater?

A. All that I do know is that he did act, and from letters received from Brown by him, which he read to me.

Q. Did you see or personally know of Campbell's working for Brown in connection with sale of heater rights otherwise than that you know he was trying to or did effect sale of such rights?

22 A. That is all; I only knew he did effect sales.

Q. Do you know of any sale of heater rights that he ever effected in the name of Brown?

A. Yes, he did. In Taunton, Campbell frequently used Brown's name, as that Brown would back up all that was done. I don't know that he ever made any contract or passed any title in Brown's name in connection with heater.

(The testimony that Campbell was working for Brown was stricken out as hearsay, because it so appeared from foregoing cross-examination.)

When I went back to Taunton after my arrest, it was to close a trade begun before. I went on my own hook.

DECEMBER 29, 1870.

Re-examined by plaintiff:

Whilst in Troy, in spring of 1856, a day or two before Lincoln came, I spoke to Brown about an intended sale of New England States to a company; I gave him a general statement about it; told him names of parties who had agreed to take hold of it; of Brown, of Taunton, and what he proposed to take and pay in; also of Dickermans, and of Pratt, (Jared,) and of Sherman, (a carpenter,) of Hale; gave him names of all who had agreed to take an interest in the company; told him what I knew about their responsibility; after taking a list of them (or memorandum) very little was said.

(Paper shown witness.)

Have seen it before. It was made by Daniel S. Dickerman.

(Duplicate paper shown witness, marked "Exhibit B.")

Got that paper in summer of 1856; don't know who made it; I got it from one of the men named in it.

(Paper shown witness, marked "Exhibit C."

23 It is a paper served on me when I was arrested in 1856, and I handed it to Mr. King, and he gave it to me this morning.

Q. Can you tell dates of letters to and from Brown?

A. Yes—from my diary of those years. December 15th, 1855, received at Boston a letter from Brown; December 17th, 1855, received a letter from Brown; December 14th, 1855, p. m., I arrived in Boston; Dec. 18th, 1855, wrote to Brown; December 24th, 1855, wrote to Brown; December 22d, 1855, received letter from Brown.

27 first learned about it in the winter of '55 or '56; knew about New England Grate Co.; was a member of it; it was a joint-stock company; knew about purchase from Neer.

About January, 1856, Hubbard came into our office, and introduced himself and the subject of this heater; said he had something new in the way of a heater he would like to put in there, and recommended it highly; he put it in; it worked as he said it would; he wanted me to take hold and help get up a company; I did so; introduced him to a number who took hold of it; they bargained for New England States, except Massachusetts; bargain consummated in May; deed was given some two months after; stock was not all taken until after May; that was what delayed the deed; think the list shown (marked A) is true list of stockholders; became acquainted with Campbell before bargain was made; he was co-operating with Hubbard; became acquainted with Stone before bargain was made; he was also co-operating with Hubbard and Campbell; not much; Hubbard and Campbell said they were working on a per cent. with some other parties.

Q. For what other parties did they say they were working?

(Plaintiff proposes to prove they said they were working for Brown & Stone, or one of them.)

(Objected to as incompetent evidence and hearsay as against Brown. Objection overruled. Defendant Brown excepted.)

A. Campbell and Hubbard said they were both acting for Stone; some of the parties did not know who was responsible; if Campbell and Hubbard were; I asked Campbell and Hubbard about it; they said they were to work for Stone; he is in Troy; and Brown backed it all up; he is the man at last who backs it all up.

At the close of plaintiff's proofs, Brown's counsel moved to strike out this answer as hearsay and inadmissible, and the referee granted the motion.

28 When I saw Stone I asked him same question, so that I could tell my folks; asked if he was the man they were to work for, and if Brown was principal.

(Plaintiff offers to prove that Stone said that Brown was his principal. Objected to on the ground that what Stone said is incompetent evidence as against Brown. Objection overruled. Defendant Brown excepted.)

A. Stone said they were acting through him, and he through Brown; said he was acting for Brown.

(At the close of plaintiff's proof, the defendant moved to strike out this testimony as inadmissible to prove that Stone was acting for Brown, or that Brown was Stone's principal, and as not pertinent to any other question, but at the same time conceded that Stone was then engaged in selling heater rights. The referee denied the motion, and thereto the defendant Brown duly excepted.)

Stone and Hubbard had a disagreement; Stone, Hubbard, and Campbell were there; Stone and Hubbard didn't speak together; Campbell was a go-between with Stone and Hubbard; when Hubbard came back after his arrest, he said he would do no more; then Campbell came to me and said the trade would fall through if Hubbard did not help, and said if would take hold and help, he would give him money for traveling expenses, and see that he had his share of proceeds according to prior agreement.

Cross-examination:

The bargain for sale to New England Grate Company had not been

completed until after Hubbard's return there, after his arrest;
29 I should say it was in May when bargain was completed; no paper was made or written agreement, until the deed of the territory was given.

Don't know of any writing between New England Grate Company and any of these parties, except deed from Stone as attorney for Neer.

In forming New England Grate Company, Butler & Smith put into it Massachusetts, which they had bought, as I think.

During the summer and fall of 1856, Stone, Hubbard, and Campbell were all engaged there in getting up a company, which bought right for certain States of Rich's patent plow; I was more interested in this than in the heater company; there was talk about this before heater bargain was made, but not much done in it until after that.

Hubbard brought a plow there soon after he first went there; it remained there; it was tried, or one like it, in the spring, on my brother's farm.

The New England Grate Company stopped operating, for they found their title was not good; the company had made a few heaters, and had sold but a few at the time they found out their title was defective.

HUBBARD recalled and further cross-examined:

(Witness shown paper marked Exhibit 6.)

It was written by me; that is the one I spoke of as written from New York.

Exhibit 6 read in evidence.

(Witness shown letters marked Exhibits 7, 8, 9, 10, and 11.)

30 I wrote them. (The same were then read in evidence.)

When in Troy, just before my arrest, I did not claim half of proceeds of Massachusetts sale; I claimed if they refused to take my expenses out of gross proceeds and divide the rest, I would have one-half of gross proceeds, as I had done whole work in Stone's absence.

JANUARY 26, 1871.

CHARLES NEER called by plaintiff and sworn:

Reside in Brooklyn; know plaintiff; knew Stone in his lifetime; was inventor and patentee of Neer's patent heater; first conversation I had with Stone in relation to heater was before I made any sale, except to Morrison; had conversation with him in relation to selling this patent; I gave Stone power of attorney to sell patent; I delivered it at Brown's office, pursuant to request of Stone in a letter he wrote; can't say I handed it to Brown; can't say I left it with him; this was in winter of '54; Stone divided proceeds of sale of patent between Brown and himself, and me; Stone said sale was of western sale, which Hubbard testified to.

First I heard of Massachusetts sale was after it had been made and part of the money paid; was about home in March, 1856, and in good health, for aught I remember; don't think of any reason why I could not have seen Lincoln at that time; Brown paid me two checks of $50 each on account of Massachusetts sale.

At the time I revoked Stone's power of attorney had heard of negotiations for selling New England States; after revocation I received at Brattleboro a telegram from Brown; on receipt of it I came immediately to Troy; went to Brown's office; saw Stone there, and in course of the day saw Brown; they were together during the talk; Stone was offended at the revocation; he said there had been a sale; I asked him

amount of sale; he mentioned $10,000; he said he wanted his
31 power of attorney renewed as it was, or he would blow up the sale; I was willing, and renewed it; Stone was unwilling to take the new power unless I would put in it something against Hubbard, about matters between him and Stone; that I said I could not do; Brown then sketched a paper as a kind of compromise; Stone looked at it and said he would not take it; Stone wanted the power of attorney full, just as at first; I rather objected to that, but wanted it to apply only to the trade he was negotiating; Brown then said, as he seems to feel so about it, you give him a full power as before, and I will guarantee that it shall go no further than to carry out trade of New England States; afterwards in the evening one was made out (July 3d,) and executed at Brown's house; Stone went off with it; I left it at Brown's house.

Heard of complaint that New England Grate Company were not satisfied with their title; was present at Troy House some time after sale; several were present of that company; Dr. Dickerman was only one I knew. Scott was there, and Millard, his attorney; also Brown and Stone. Millard said to Brown, "We are now ready to give a suitable, full title, provided you will account to Scott for his proper share." Nothing further of any substance was said or done; can't remember of a word said after that.

In February, 1853, I made a contract with Morrison about patent when I got it; afterwards gave him a deed of one-half of patent, excepting Troy and Albany. Soon after that he gave me back a writing. I have searched for it, but cannot find it. It was before any power of attorney to Stone; purport of paper was that I could go on and manufacture and sell heaters and rights as though he had no interest in the patent. It
was a paper; can't say it was sealed. I was to have all the pro-
32 ceeds. When I made the sale to Scott, I did not remember I had given a deed to Morrison. I had from Scott, a few days after my deed to him a power of attorney from him. (The parties admitted that no such power of attorney was ever recorded.)

(Plaintiff read in evidence a copy dated July 23, 1855, marked "Exhibit D.")

When Stone called on me the night before he went to close the Massachusetts sale, I told him I was acting under a power of attorney from Scott; I don't know that you can make out a legal title. He said, "Oh, yes; just as well." He waived the question and let it go.

(This testimony, as to what was said between Neer and Stone was duly objected to by Brown's counsel as inadmissible and incompetent against Brown, but the referee received the same, and thereto defendant duly excepted. Afterwards, at the close of the plaintiff's proofs, Brown's counsel moved to strike out said testimony on the same grounds, but the referee refused to do so, and thereto Brown's counsel duly excepted.)

Cross-examined:

What was divided as proceeds of western sale was a lot of jewelry and some copper stock. It was at Brown's office, on River street, near the Northern Hotel. I remember the circumstances. Stone and I did not attempt to divide it. The jewelry was not divided into two lots by Brown, and then Stone and I select, turning our backs; one-fourth was divided to me, and the remaining three-fourths equally between them. I took forty shares of the copper stock, which was a little over one-fourth of the stock. I think Troy House meeting was in November,

1857. It was in the winter season when I told Stone I had a power of attorney from Scott.

(Plaintiff offers in evidence a deed from Morrison to Scott, dated
33 August 28, 1856, and parties agreed that the same was a deed in due form of Morrison's interest in the patent, and that same had never been recorded.)

At the time I came to Troy from Brattleboro, Brown gave me $15. Understood that the paper Morrison gave me was in effect a reconveyance of the interest I had conveyed to him.

MARCH 28, 1871.

LELAND CRANDALL, called by plaintiff and sworn, testified as follows:

I reside in New York; know Neer and Brown; knew Stone; purchased a right to Neer's patent heater from Stone; contract was made in Detroit thirteen or fourteen years ago; resided at Detroit at that time. I resided there about a year; bought the right to sell heaters in New York and Brooklyn cities; think no one was connected with me in this purchase; not certain; think Wallace was not; negotiation was with Stone; in payment turned out a mortgage, some jewelry, and some copper stock; mortgage was $6,000; I think on property in Erie County, N. Y.; can't give any more particular description, it was so long ago, and I never investigated the thing; can't tell the amount of jewelry. Some I got in trade in New York when I was there, breast-pins, &c.; can't recollect what copper stock it was; stock of a copper mining company; don't recollect where the company was located, nor its amount; considerable amount on its face. We called the consideration $10,000, I believe; knew a Mr. Hubbard there; saw him and Stone together, but can't say at time this trade was made.

Cross-examined:

The territories I bought were New York and Brooklyn cities. A deed or contract for same was executed to me by Stone; don't think I have it; don't know what has become of it; can't state in what name
34 it was executed; can't tell from whom or to whom mortgage was, nor on what property, except that it was in Erie County. I got it of Judge Francis N. Mann.

I said patent-rights were called $10,000. I mean they were called that payable in mortgage at its face and copper stock at its par. Can't tell what we called copper stock. Trade was called $10,000 in this way of payment; don't mean any such thing as that this mortgage was actually worth $6,000. I went to New York and found that the same principle as this heater was in operation in Baltimore, and parties were carrying it on, and so I did nothing; had no money to carry it on.

Jewelry was some cheap and some valuable, some gilt, some plated, and I think some of it was real gold; can't tell the true character of it, or its value.

Re-examined:

My impression is the jewelry was called about $300. I got them at fair prices in New York, but can't say I turned it out at the same rate.

Recross-examined:

I knew about sale to Wallace; made about the same time as sale to me, within a few days. No jewelry or copper stock was turned out in that trade that I ever knew of. I was indirectly interested in that trade. I was thinking Wallace gave his notes.

ISAIAH SCOTT called by plaintiff an' sworn:

I am the plaintiff. I reside in Brooklyn; don't remember the time I purchased patent-rights of Neer.

Q. Did you ever know of sales made in Detroit of right to vend Neer's patent heater, and by whom made?

(Objected to: 1st, as immaterial; 2d, sales by Stone, as attorney for Neer and in the name of Neer, did not and could not affect plaintiff or his rights; 3d. If such knowledge would estop plaintiff from setting
35 up his title as against grantees, he would nevertheless not be entitled to any proceeds of such sale. Objections overruled. Defendant excepted.)

A. Yes.

Q. When did you acquire that knowledge, and from whom?

(Same objection and ruling and exception.)

A. From Mr. Neer, about the time the sale was made.

Plaintiff then proposed to prove that previous to any sales being made by Stone under power of attorney given him by Neer, plaintiff was informed that such power of attorney had been given, and that Stone was proceeding to make sales under it, and that immediately after sales were made by him the fact that he had made such sales was communicated to Scott, who approved of them; and that he received a portion in kind of the proceeds of sale or sales made at Detroit, knowing it to be such proceeds; and, also, that before the sale of Machusetts was made by Stone, and before sale of New England States was made, he knew that such sales were contemplated, and that Stone had been authorized to make them.

Such testimony was objected to on the same grounds as above questions, and because plaintiff cannot at this day prove an estoppel against himself by revealing such facts, nor thus acquire a right to proceeds of sales which did not otherwise affect his rights. The referee overruled such objection, and thereto defendant excepted.

A. I know that a sale was made in Detroit; understood so from Neer; and that jewelry and copper stock and notes and mortgage were received; did not know amounts; knew the sale was made by Stone; received some of the copper stock; forty shares; knew Stone was negotiating for the sale of Massachusetts; knew one was made; knew of contemplated sale of New England States; supposed Stone made
36 it; knew of sale; understood that Stone made it; learned about facts from Neer about the time of the transactions; knew Stone had had a power of attorney from Neer; never made any objections to these sales that I am aware of; I called on Brown once as to the proceeds of the western sales; Neer was with me; didn't know Brown until then; I spoke of this matter as mine; it was not long after the western sale; I believe it was before the Massachusetts sale, but can't say positively; saw Brown at his office in Troy; subject of consideration was as to a division of the property received from those sales; can't repeat what was said; can't recollect definitely enough to give the substance; Neer was present, and took part in the conversation.

Cross-examined.

The information about western sales which I acquired from Neer was acquired mainly by letters; I have those letters; have recently looked over some of them; heard Crandall testify this morning; somewhere about the time, I was informed of the sale he testified to; I don't remember that I saw the deeds given, or the copies of them; I presume I was informed at the time in whose name those deeds were executed; I can't say anything more definite.

Q. Were you informed that the deeds or bills of sale of territory for Neer's heater were made by Stone as attorney for Neer, and purported to convey only Neer's interest in the patent as to such territory?

A. I do not think I was so informed.

Q. Will you swear that you had any interview with Brown before the sale of Massachusetts was made?

A. I cannot.

Q. Were you informed at the time the sale of Massachusetts or the other New England States was in contemplation or progress, that
37 either such sale was to be only by Stone as attorney for Neer, and only of Neer's interest in the heater patent?

A. I was not, and did not so understand it.

Q. Were you informed, about the time *of* the sale of Massachusetts or of the other New England States was consummated or soon afterwards, that either such sale was consummated by a deed from Stone, as attorney for Neer and in his name, and which purported to convey only the interest of Neer in the heater patent?

A. I don't remember that I was told exactly how those deeds were made; understood them as made by Stone as attorney.

Q. Were you informed in whose name or for whom Stone so executed those deeds as attorney?

A. Don't remember that I was.

Q. Were you informed about the time of same, that those deeds only purported to convey Neer's interest in the heater patent to such territory?

A. I don't remember that I was; the assignment from Neer to me was recorded in the Patent-Office soon after it was made; I knew that fact at the time; I had an interview Nov. 20, 1857, at Troy with Brown, Sherman, Pratt and Dickerman of Taunton, Mass., and Brown, Stone, Campbell and Neer of Troy, and J. A. Millard as my attorney, and on that occasion, through Millard as my attorney, I offered to give a deed and make good the title of the New England Grate Company to the territory that Stone, as attorney for Neer, conveyed to that company, upon condition that Brown and Stone would account for and pay over the amount received by them on such sale, or my share of such proceeds; I understood after the deeds of Massachusetts and other New England States were given that they were defective; may have understood
38 at the time what the defect was, but don't remember now; understood that purchasers were unwilling to go on under those deeds; they applied to me to make good their title; for deeds or title to the territories; learned it a while before the Troy House meeting; two or three of the parties had been to see me before that interview; at Glen's Falls; should say some weeks before the Troy House interview; they said the title was not good, and they wanted me to make it good; I did not make it good; I did not offer to make the title good to them; at the Troy House meeting I don't remember that any of the parties stated what the defect of title was; I think I understood at the time what the defect was; at the Troy House meeting I did not offer to these parties, or any of them, to make their title good; I don't know that I ever executed any deed to the Massachusetts or New England parties; when I saw Brown about the western sale, I can't tell the language how I spoke about the matter as mine; or the substance; the proceeds I received from western sale I received from Neer; Neer did not purport to hand over to me all the proceeds he received from the western sales; don't remember that he handed over to me any particular share; don't remember that he gave me any jewelry; he informed me that he had

received some jewelry; I understood I got all the copper stock he had received.

Q. About the time you gave the power of attorney to Neer, did you make any arrangement with him as to the division of the sales of heater rights?

A. I should think not; don't remember that any arrangement was made at any time as to a division; Neer was indebted to me at that time;

I have been informed that suits were brought against Brown on
39 account of defective title; brought by Massachusetts and New England parties; don't remember of hearing of but one suit until recently; can't say that I heard of that suit before Troy House meeting; nor that I had not; heard at the time about suit of Brown against Hubbard; don't remember of being informed that Brown paid over to Neer some of the proceeds of that suit; I have got the copper stock yet; it has no market value.

CHARLES NEER recalled by plaintiff:

In my former examination I did not state all that occurred at time of partial division of proceeds of western sales; when Brown spoke about getting at one-quarter, Stone was sitting near me, and leaned forward towards me and said "Mr. Neer, I will take the Morrison interest we have talked of, and pay you (with some hesitation) when I can;" this was in the hearing of Brown. I said to Stone, "Oh, that will not do;" then I turned and explained to Brown that my object was to have it in the hands of persons pecuniarily able to manage it, and explained to Brown the conversation I had had with Stone, offering Stone to sell him and Brown the Morrison interest, but as he had left without closing it, I told Brown I was then willing to sell the Morrison interest as we had talked, and if he chose to do so, I was then willing to take one-quarter as my share, provided they took the Morrison interest, as they had been at the expense of selling. Mr. Brown declined, saying they had considerable business (I think he said plow territory); then said I to them both, that it must be understood that no further sales of heater must be made, unless they were willing to sell at the usual rate of one-half. Mr. Brown declined that also; declined doing anything further with it; then we separated; after that I had no further particular

arrangement with Stone. Within a few days afterwards I met
40 Brown, and he said *as* Stone and some one else, I think in Detroit, had been talking with a gentleman who was going to Boston, who was willing to buy the right of Massachusetts, if they could find another gentleman to take one-half interest as equal owners, and that he would like to have Stone go on and carry out the trade. I assented to it; that was all; saw Stone a few days afterwards at my house; and not again for some weeks, that I remember. He returned from Boston unwell.

Interview with Stone and Brown, when I came here from Brattleboro, on the first day was most of half a day. Brown was there most of the time; the subject of Stone's power of attorney was the only subject; met again next day at office; was there a large share of the day; conversation was with both; did not state on previous examination all that occurred. I had objected to giving a power of attorney to Stone. In the evening at Brown's house, where we made (I think) the power of attorney, after Brown's assuring me in substance that the New England sale should be properly carried out and accounted for, and should go no further than that, I consented to sign; that was all; next morning I left for Brattleboro.

I had a conversation with Brown about the proceeds of sale of New England States other than Massachusetts, that had come to his possession.

On May 27th, 1857, I saw Brown, and he mentioned to me that he had all the property that was taken on the New England sale that had come to his hands, just as he received it and when he could give a perfect title he was willing to make a fair division of it. I wrote to plaintiff on that day.

(The parties then admitted that Zaccheus Sherman on August 2, 1856, deeded to Brown a pew in a church in Taunton; consideration named $200; and November 27, 1856, Brown conveyed the same to Joseph A. Hall; consideration named $150.)

41 MARCH 29, 1871.

Cross-examined:

I was examined in suit tried at Boston between Hubbard and Brown, as a witness for Hubbard; have lately had in my possession a copy of the minutes of that trial; have partially read over some time ago the minutes of my testimony there; have within a week or two; that trial was seven or eight years ago or more. I have no memorandum taken at the time as to any of the interviews testified to by me; don't think I made at or about the time any memorandum of interviews with Brown or Stone. The conversation which I related yesterday as occurring at the time of the jewelry division, occurred before we made the division. We afterwards divided; the conversation so related occurred while we had the jewelry on the desk, but I cannot say whether it was on the occasion of the division of the jewelry; the conversation occurred before I took my portion. I think I took one-quarter of the jewelry and copper stock at the same time; at the time I took my portion of jewelry, I objected that it was not the part that belonged to me, and so objected after I received it; after that I can't say I personally claimed of Brown or Stone any more jewelry or copper stock. Have been present during all this trial. I heard plaintiff testify yesterday; was present with plaintiff at an interview with Brown; can't locate it very precisely; think it was early in the summer of 1856, but am not certain. I fixed the date May 27, 1857, by a letter I wrote to Scott the same day.

Q. On your direct examination, on the first day you testified in this case, did you not assume to relate all you then remembered as occurring between you and Brown at the time you came on from Brattleboro?

A. I think I did.

42 Q. Can you now relate any portion of any conversation you had with Brown at the time you came on from Brattleboro, in the language used by either of you on that occasion?

A. Probably not, word for word.

Q. Relate what passed between Brown and you at the time he drew up the paper finally signed by you, and as accurately as you can.

A. He said Stone had a delicacy about it, and wanted the power of attorney renewed, same as the former one. I objected, and said I could see no necessity for a power of attorney as at first, for the reason that Mr. Brown was authorized to sell Massachusetts, and all it needed was an extension to carry out that sale of the New England States so far as he had negotiated; and Stone objected to going back unless he could have it full as in the first place. I objected to giving it in that way, but as Brown guaranteed against its going any further than to carry

out that sale, I signed it; that is, he verbally guaranteed it; gave me his word; that is as near as I can state it. When I signed the new power of attorney, that closed the interview. The parties then admitted that defendant Brown through his suit against Hubbard received some proceeds, which Hubbard received from the Massachusetts sale.

Plaintiff rests.

Defendant Brown then moved for a non-suit on the grounds—

1st. That no joint liability is proved against him and Stone, or against Brown as survivor.

2d. That no cause of action is proved in favor of plaintiff against Brown, either as survivor or individually.

43 3d. That under the acts of Congress of the United States concerning letters-patent, and especially the patent act of 1836, and especially section 11 of said act, Scott's title, interest, and rights were unaffected by the sales made by Neer, and by Stone as his attorney, and therefore that plaintiff has no claim herein based on any such sale. The referee denied the motion, and thereto defendant duly excepted.

MAY 25, 1871.

CHARLES K. BROWN sworn for defendant.

Am the defendant in this action. I came to Troy in the spring of 1852. Went into the business of manufacturing plows and sale of rights to Rich's patent plow; the firm was Bosworth, Rich & Co. I bought out Bosworth. The company was Samuel H. Stone, the father of Samuel S. Stone. At the time I went there Samuel S. Stone was in the employ of the company. Samuel H. Stone lived in Connecticut. Samuel S. Stone held a power of attorney from his father and Mr. Rich, and acted for them, but more particularly for his father; firm became Brown, Rich and Stone when I came. I took Bosworth's place; the other members remained. Samuel S. Stone continued to act for his father and for the firm as agent. In the latter part of 1853 I bought Samuel H. Stone's interest, and continued with Rich. Next Phillips came in as partner with Rich and me, November, 1854; then December, 1854, I bought out Rich. After Phillips came in the firm was Rich & Co.; when Rich went out the firm-name was C. K. Brown & Co. Continued business till fall of '55 with Phillips, then I bought out Phillips and continued alone till March or April, 1856, when Geo. W. Lyman came in, and we continued about two years under the name of C. K. Brown & Co. When I went into the business John Rich owned the plow patent. Rich deeded it to firm of Brown, Rich & Co. when

44 that firm was formed. When I bought out Samuel H. Stone I bought his interest in the patent. Rich sold his interest to Campbell (Wm. M.) about the time I bought out Rich. Within two or three weeks Campbell deeded to me, and I continued to be legal owner until '57 or '58, meanwhile selling rights. During this time Samuel S. Stone was agent, with power of attorney to sell plow rights. He was not a partner in the business during any of this time. I have been present during the trial and heard the testimony. Don't think I knew anything about the western sales of heater rights testified to, till after they were made. May have heard about the same. Did not have anything to do with those sales or either of them. Did not employ Samuel S. Stone in that connection at all.

Q. Did you have any arrangement with Neer whereby you were to have any interest in the proceeds of either of those sales?

A. No, sir.

Q. Did you have any arrangement whatever with Samuel S. Stone for any interest in such proceeds?

A. No, sir; was present on occasion testified to by Neer when a division of jewelry was made. It was at my office.

Q. State what took place.

A. My recollection is that Stone and Neer came in with the jewelry and attempted to divide it; finally invited me to assist. I did so. It was divided into four parts, by taking prices marked on them. Neer took his choice of the four. Stone took the other three-quarters. That is all the part I took in the transaction. I did not take any part of the jewelry; did not claim any part of it. There was no conflict of statement between Neer and Stone as to proportions of division. Have no recollection that Neer talked to me about the Morrison interest
45 in his patent; think he did not; will be positive, for I did not know about the Morrison interest until after that. No question was raised there about Neer's interest in future sales; not in my hearing. Nothing said in my hearing about his having one-half interest in those sales or in future sales. He did not in my hearing claim more than one-quarter interest in the western sales. Have no recollection of any division between them of copper stock. Took no part in any such division.

Q. Did Neer then on occasion of jewelry division, or at any time before this suit was brought, in your hearing claim more than one-quarter interest in proceeds of sales of heater rights?

A. No, sir. I remember the occasion Scott called on me with Neer at my office, early in 1856.

Q. What occurred?

A. Neer introduced me to Scott. Scott said he called to ascertain the value of some copper stock which Neer wished him to take and credit him on account. He wished to learn its value, to know what he should allow him for it. I told him I knew nothing about it, and referred him to Stone. They asked for Stone when they came. That was all that occurred. On that occasion Scott did not speak of the heater patent as his, nor of having any interest in the proceeds of the western sales. There was no other subject introduced than the one I just now mentioned. The first I learned that Scott had or claimed any interest in Neer's patent was in August, 1856. I know Hubbard, plaintiff's witness; in 1856 he had a power of attorney from me to sell plow rights; he was not in my employ in any other business; Stone was also in my employ with a power of attorney to sell plow rights; I did not employ Hubbard in connection with the heater business; did not employ Stone to make sale of heater rights; did not authorize Stone to employ
46 Hubbard in that business. I had something to do with making heaters.

Q. What?

A. I lent Neer money from time to time, and also became responsible to Phillips and partner for castings; to assist Neer in furnishing sample stoves and patterns; with the understanding that the stoves and patterns were to be held by me, and I to sell them and be paid out of the proceeds.

Q. What, if anything, did you do in the way of paying for such stoves and patterns and selling them?

A. I became responsible for the stoves, and paid the bills when Phillips presented them, and furnished brick for lining, and shipped three stoves, and got pay for one; and the balance of stoves on hand were

taken away by Neer, and charged to him by me; the stoves and patterns when made came into my hands; those I paid for did.

Q. Has this indebtedness of Neer been paid?

A. It has not, otherwise than by proceeds of suit against Hubbard. In December, 1855, I received a letter from Hubbard, dated at New York; Exhibit No. 6 is it; I answered it; Exhibit No. 4 is a copy of the answer; it was sent to Hubbard; my recollection is it was sent to Boston. (Exhibit 4 and 6 introduced.)

Q. State whether you wrote to Hubbard whilst he was at Boston, or at any time, about employing him in connection with the sale of heater rights.

A. No, sir. Exhibit 4 is the first letter I wrote to Hubbard after he went to Boston.

Q. When was it that you first learned that Stone had undertaken to employ Hubbard for you in connection with the sale of heater rights to Butler & Smith?

A. Within a day or two of April 9, 1856, when the suit was brought by me against Hubbard.

Q. How came you to bring that suit?

47 A. Stone and Hubbard differed as to what Hubbard was to have, Hubbard claiming one-half of proceeds of Massachusetts sale; Stone claimed he was to pay him one-quarter; they got into a quarrel about it; Hubbard told Stone he would go home to Michigan unless he could settle on his terms; Stone fearing to commence a suit in his own name on account of his indebtedness, wished me to take assignment of claim and prosecute it; Stone gave me an assignment from Neer, by him as attorney of the claim; Stone told me it was by Neer's direction he made it; I told Stone at first I would not do it unless I had an assignment direct from Neer; he went for such assignment, and reported that Neer directed him to make the assignment; I received the assignment before commencing suit against Hubbard; it was same evening that suit was commenced; it was all done hastily; the suit was brought in the evening, and arrest made; Hubbard was about to leave town that evening.

Q. Did you, in any way that you are aware of, ratify Stone's employment of Hubbard for you, in connection with sales of heater rights, except by that suit against Hubbard?

A. No, sir. I received some proceeds in that suit. The first was $1,000 per draft. I gave Neer $100 of it. I told him I had received $1,000 of the proceeds, and that I wanted to pay him his proportion of it, and by reference to account I had against him, we agreed that the account with $100 would make about $250, which would be his proportion of the $1,000. At that time I had not been informed of any assignment by Neer to Scott, nor that Scott claimed any interest in the proceeds. Had not then been informed that Neer claimed more than one-quarter of the proceeds. Never was so informed until after this suit

48 was brought. I never claimed any share of proceeds of Hubbard's suit as against any one but Hubbard. Only as parties owed me I expected to get pay out of it. I remember the interview with plaintiff's witness, Lincoln. Hubbard was here before Lincoln came. Was the first time I had seen Hubbard for a year or so. Did not do any business with Hubbard before Lincoln came.

Q. Relate interview with Lincoln.

Hubbard came into my office with Lincoln and Stone; came in with them, or immediately afterwards. Lincoln was introduced to me, and after he had conversed some with Stone and Hubbard about the

deed, Stone wished me to furnish Lincoln a set of patterns and a sample stove. I bargained with Lincoln for them at $100, and took his written order for them. I don't remember any other matter I had to do with. I am inclined to think I heard some talk about the deed, but it is very indefinite in my mind.

Q. Did you, on that occasion, tell Lincoln that you would ratify any sale by Hubbard of heater rights?

A. No, sir; nor any deed of heater rights, nor anything. On that occasion I was not, in my hearing, spoken of as having any connection with the sale of heater rights, nor any time whilst Lincoln was here. I left my office before Lincoln and Hubbard and Stone did. Went home to give directions about supper for them. Stone's family and mine lived in the same house; separate apartments, and separate tables. Stone's wife and child were sick at this time. Stone and Lincoln and Hubbard took tea with my family. Lincoln and Hubbard stayed that night with Stone. They took tea with us at Stone's request. After tea they went to Stone's apartments, and I did not see them again that evening. Did not see them again unless to say good-bye early next morning. Had no business conversation with them at the house.

49 Q. Did you tell Lincoln that you would guaranty Stone's deed as all right?

A. No, sir; I have no doubt I may have said it was all right, if he asked me, but I have no recollection of any such question; I knew at that time that Stone had had a power of attorney from Neer, and supposed he had it yet; the subject of my having any connection with the sale of heater rights was not spoken of in my hearing whilst Lincoln was here; nothing about seeing Neer was said in my hearing; don't remember of hearing about sale to Butler & Smith, till Hubbard and Lincoln came. I did not before that sale tell Neer that I would like to have Stone go on and attend to that sale; made no request whatever of Neer in connection with that sale. I have the assignment executed to me of claim against Hubbard, dated April 9, 1856. (Introduced, marked No. 12.) Next day after receiving the assignment I spoke to Neer on that subject; I went and saw him; I told him I had commenced suit on assignment from Stone for him, and he said it was according to his instructions the night before. When Hubbard was here first I did not give him any directions about selling notes received, or to be received, from Butler & Smith. I suppose Hubbard then held a power of attorney from me for sale of plow rights; it was made to him and Richard Brown of Cleveland; he had been trying to sell plow rights in Boston; when Hubbard came to Troy on the occasion of my seeing him, Stone was not at home; he had gone east to find Hubbard; before Stone came no business was done (except to look over my individual account with Hubbard) about plow matters; it was a book account; the two heaters sent to him were probably in the account; did not at-

50 tempt any settlement with him about the Massachusetts sale of heater rights; nothing done about that before Stone returned; I think Hubbard was here one or two days before Stone came back. Neer applied to me to take an interest in his patent, more than once; first time was, I think in the fall of '55; before the jewelry division; I told him I would allow him to put a heater in my house, and would try it, and if it proved satisfactory would talk with him about the right. One was put into my house; he continued to work at it and remodel it, till some time I think in Feb., '56. It proved a failure, and he took it away; I told him I was not satisfied with the working of it, and preferred not to have anything to do with it. He spoke about my taking an interest

in it July 3d, 1856; it was the time Stone took a renewal of his power of attorney, after it was revoked; he offered to have me take his patent on the same terms Stone had it, paying him one-quarter of the proceeds, and after selling enough so as he would realize $3,000 he would relinquish it; I told him I would not do anything about it then, but after he had closed the trade which had just been made, if everything proved satisfactory, I would talk with him further about it. I had no further talk with him on that subject. He came to Troy that time in answer to a telegram from me. Stone had spent considerable time in Taunton for me making a sale of the patent plow. Just as it was time for closing the plow trade, Neer revoked his power of attorney, and Stone came home immediately and said that there was no use in his going back again unless he could be reinstated in his position to do business. Stone was sick a day or two after he came home, and requested me to go and see Neer, and see what the trouble was. I went,
and found Neer was in Vermont, and, at the request of Stone, tel-
51 egraphed to him, and he came. In May I had sent a plow to
Taunton, and it had been tried there. Sale of plow rights was going on with Dr. D. S. Dickerman and a foundry company in Taunton, by the name of Eddy & Co., and other parties. This was after Hubbard's arrest. When Neer came I think he met Stone first. I met him and talked with him; explained to him the damage his revoking the power of attorney would be to me in my business, and he and Stone commenced talking about the renewal of it. Stone wanted a paper that would censure Hubbard pretty severely. Neer objected to that part; was willing to renew the power of attorney, but objected to the censure. Stone drew a paper and submitted it to Neer, and Neer objected to it in consequence of its severity on Hubbard. They referred it to me to reconcile the matter between them. I advised how to change it. We parted. The terms of it had not been arranged between them when I left. In the evening of the same day they both came into my house with a paper, a portion of it erased; and Neer asked me to look at it, and said they had agreed on it, and I think asked me to copy it; I did; Neer signed it and took it. I have stated all I remember of my connection with the renewal of the power of attorney; I did not then have any arrangement with any one whereby I was to have any interest in the proceeds of sale. Whilst Neer was here on that occasion I did not say anything to him about my accounting to him for the proceeds of the sale talked of, (the New England sale;) I did not in any way assure him that the sale should be properly carried out; nor that the sale should be accounted for; nor that the power of attorney should not be used for any purpose but to carry out that sale; I did not say anything about assuming any relation to that sale; I understood that the deed
had been made, and that Stone had entered into arrangements to
52 sell out the stock of the New England Grate Company, and I sup-
posed that selling out that stock was the business Stone was then engaged in. I had no conversation with Neer in relation to my having any connection with that sale or the proceeds, except as I have stated, that Neer wanted me to take an interest in the patent. After I brought suit against Hubbard, I had no business relations with him that I remember; I did not employ Stone or Hubbard in connection with this sale. I took no part in it; I have no recollection of having any connection with it. A deed of a pew was made to me; I knew nothing about it before it was done. I made a transfer of it on request of Stone. I had no avails from it. Stone was a brother-in-law of mine; during this period he was insolvent; he was a judgment debtor to a considera-

ble amount. Scott and Neer were brothers-in-law. I never claimed any share or interest in proceeds of the New England sale. I first learned of the assignment from Neer to Scott in 1856. Neer never called on me to account for any proceeds of the New England sale. Before suit he never claimed that I was liable in that connection. I was sued in Massachusetts in connection with this business; in the spring of 1857; by Taunton folks who became interested in heater rights. It was one suit brought for damages for defective title; it was pending at the time of the Troy House meeting testified to; that meeting was in the second story of the Troy House; I was not there at the commencement of it; I had no connection with the meeting properly; there were two rooms; one front and one back of it; the parties, Scott and Neer, and Millard and Taunton folks, were in the back room; I was at the front window all the while I was there; I heard some of what was said; I took
53 no part in it; didn't hear all that was said; I knew the object of it; I don't know that I heard there what the Taunton folks claimed. In the suit spoken of against me, Neer, and Stone, and Campbell were defendants with me; no proposition was there made to me that Scott would make good the title if I, or Stone and I, would account for the proceeds of the sales; Millard did not address to me any proposition; I heard a proposition made to the Taunton folks; it was that if they would guaranty the payment of the proceeds to Scott he would make the title good; they declined to do so, and were not satisfied to receive the title without damages. I understood before this meeting that Dr. Dickerman and Stone had been to Glen's Falls and seen Scott.

Q. Was you put to expense in the suit spoken of against you?

A. Afterwards other suits were brought against me in this connection; ten suits by ten different parties, who were purchasers of this Neer's patent; New England Grate Company parties; against me individually; these suits were continued some time; not over a year; and were then discontinued on my paying the costs of part of them.

JUNE 1ST, 1871.

Direct examination resumed:

I think I never had any conversation with Neer about any proceeds of the New England sale being in my hands. The last time Neer spoke to me about taking an interest in the patent was July 4, 1856. It was at the same time that I lent him $15. It was the next morning after the renewal of Stone's power of attorney. I have the papers showing the various partnership relations testified to. During the time of the heater-right sales I was a creditor of Samuel S. Stone.

54 On the 4th of July Neer said Morrison had a paper from him for some assistance Neer had received in the early part of his patent, but it did not interfere with title to territory. He said there was no encumbrance on the patent, and he owned it all himself, except what Stone had sold.

Stipulation.

The parties then agreed that minutes then produced are correct minutes kept by T. S. Harlow, esq., of the trial in Boston in the suit of Hubbard vs. Brown et al., and that either party may read in evidence from the testimony of Brown and Neer any portion for purposes of contradiction, and then for explanation.

Cross-examination:

I heard testimony of Leland Crandall.

Q. Do you know anything of the mortgage which he spoke of as received by him from F. N. Mann?

A. I have seen it within two months at Mrs. Stone's residence; a mortgage which I suppose to be the one. Did not notice its amount. I do not know that any part has been collected or otherwise disposed of. Neer superintended putting heater into my house. I think Neer and Stone took it out. Stone did not report to me sales in Michigan any more perhaps than to mention in a letter that he had made a sale. Nothing in detail. I can't tell whether I have any letters from him on that subject. Never heard, I think, of a sale he made of heater rights to Tift of Illinois, or to Lyman. I think that either Stone or Hubbard made a sale of plow right to Tift.

Q. When and where did you and Neer look over accounts and determine that he owed you about $150, and that $100 more would make up his one-quarter of the $1,000 received in the Hubbard suit?

55 A. I think the transaction was at my office about the 1st of May, 1856. I gave him two checks of $50 each, not at the same time; a few days apart. I received the $1,000 draft from H. J. King, or Hubbard. I informed Neer of its receipt within a few days. I wanted to make up his share with what he owed me.

Q. What right had you to the other three-quarters?

A. I had a right to the whole for prosecution.

Q. How did you acquire that right?

A. By the assignment from Neer by Stone. I supposed that to be my authority.

Q. Did you suppose that assignment entitled you to retain three-fourths of the proceeds of such suit?

A. My impression is that the receipt I gave to King or Hubbard for the $1,000 left the $1,000 in my hands subject to the event of the suit.

Q. Why did you give Neer one-quarter instead of any other proportion of those proceeds, (of that $1,000?)

A. Because he had repeatedly told me that one-quarter was what belonged to him.

Q. As you derived your title from Neer, what right had you to retain three-quarters?

A. Because the suit was not decided.

Q. Do you know anything of the notes received by Stone at Detroit, for the sale of heater rights?

A. I don't think I ever saw the notes, or knew anything of their disposition; I knew nothing of any property, unless the jewelry and copper stock were part of proceeds; I bought some of the copper stock, or advanced money on it, along in the summer after the division.

Re-examined:

The suit against Hubbard was finished in 1858, about June, I think; while the suit was pending I had other conversations with Neer about it, besides at the time the $50 checks were given. The subject of

56 what was to be done with the proceeds was talked of; it was that the net proceeds of suit were to be divided between Stone and Neer, in proportion of one-quarter of the whole to Neer and one-half to Stone; Hubbard's one-quarter was allowed to him in the suit. Never any question arose between Neer and me about my readiness to account when the suit should be finished; I never expressed any unwillingness

so to account, nor ultimately expected to keep any portion of the net proceeds. I have always been ready to account to Neer as to same. This suit was brought September 11, 1856. I never told Neer I had in my hands any proceeds of the last sale, called the New England sale.

The defendant then read from said minutes, by Harlow, of said trial in Boston, the following testimony given by witness Neer:

CHARLES NEER:

"Next had telegraph from Brown at Brattleboro', July 1st, 1856. I have not it with me. I took stage and reached Troy the afternoon of next day. The dispatch requested me to go to Troy. I went directly to Brown's office and Mr. Stone's. Found Stone there and had some little talk with Stone. Saw Brown a little while, one-half or one hour. Hardly recollect what Brown said. Stone and I were in conversation. Stone seemed displeased that I had anything to say or do with Hubbard. In course of conversation Stone remarked that he had sold the heater right for the New England States; I simply asked him, 'How is that?' 'Well, I have.' Then I asked him the nature of the trade, how he had sold. He said the consideration was $10,000. He said he had raised a company there who had bought it. I think he said the company was in Taunton, Mass., and he said he had got it in a company and the shares were all sold except $2,000, which he held, as it were, in his hands.
57 He spoke more of the displeasure he felt at my doing anything, and especially at my revocation which I had given, and spoke of having the power of attorney renewed, or having it as it was when he went there. In connection with it he wanted I should give a writing charging Hubbard with many hard things. I do not know what they were. I told him in answer to that, that that I could not do, and would not; that I had seen but little of Hubbard; he was a perfect stranger, and so far as anything I saw there was nothing not strictly business-like or fair. I saw nothing to charge him with. He said if that was not done he would blow the trade sky-high, or something to that effect. I said to that, 'Very well; let it be so then; I certainly cannot make such writing.' Brown was present during this conversation, and then drew a little writing. 'Well,' I said to that, 'that I have not much objection to.' The amount of it was, that there was something erroneous in the matter without any evil intent; that is, in the course Hubbard pursued. Stone, seeing it, said, 'That will not do; I sha'n't take that,' and insisted on having something that made some pretty hard charges; and upon that we spent that day and most of the next day bantering or discussing what should be done. Brown was present most of the time, and showed a disposition to have some writing that should be a sort of compromise. I can hardly say what he said or did, except that he wanted some kind of compromise that would answer the point. Then it was suggested that he would draw something different, at which I would look, and if it would answer, sign it. We all talked. Stone insisted on such a writing. I refused, and then Brown came in and proposed a sort of compromise. I then brought up the point of renewing the power of attorney, and said I could see no propriety in renewing it except
58 so far as to carry out the sale which had been made. He, Stone, said that would not do, and then again said he would blow it up sky-high unless he could go back as he went there, that is, with a full power of attorney, to which I objected, making out a full power of attorney or renewing that in any form, except to close up the trade which had been made. Brown, then standing at his desk, turned and ad-

dressed me, saying, 'As Mr. Stone seems to feel it so, if you will renew it, I will guarantee that that shall be as far as it shall be applied.' He did not use those words, but that was the substance, that it should be used only to carry out that trade, and should not be used any farther than that. Upon that promise, there was in some form, I don't know what, given a writing restoring Stone's power of attorney which had been revoked."

Defendant also read from said minutes the following further testimony by said Neer:

"Brown did nothing to help me, except to advance me money or become security, and let me use his room in fall of 1855 and winter following. * * * The use of Brown's room was merely as a place of deposit and storage, and I also fitted in the fire-brick there. Brown did nothing about it."

Also as follows:

"I sent all the copper stock I got to Scott; he knew where it came from. I saw Scott talking with Brown and Stone in January, 1856; after Stone's return from Detroit, I think, but it is only my impression. Have no recollection of hearing Scott say anything about owning the right. We talked about the copper stock."

The defendant then rested.

The plaintiff then read from said Harlow's minutes the following testimony given by defendant Brown:

(Beginning at fol. 420.) "Stone and Neer had considerable con-
59 versation about it, as I understood, and Stone was desirous to do something with it. Stone introduced Neer to me, and stated to me that he and Neer had been talking of the patent and the sale of it, and Neer was anxious to have him take hold of it and sell it. Neer said his object in coming was to get me to interest myself in the patent with him. I told him I knew nothing about the stove or its merits, and declined making any arrangement with him.

"Within a few days an arrangement was entered into in regard to my assisting him with money, and getting up patterns and heaters; I agreed to advance some money from time to time to Neer, to get patterns to complete his stove, upon conditions. The agreement was that Neer was to put a stove, into my house and test it, and if the stove was satisfactory, I was to confer with him further about buying the right; he put it up and kept it in my basement the bigger part of the winter, taking it out and putting it in, and trying to make it satisfactory. This was in the fall and winter of '55 and '56. I agreed to furnish him some money, as I have stated, for the purpose of improving and perfecting his patent, and, as security for my advances, I was to have the proceeds of sales made by Stone, who had a power of attorney; I was to have from such proceeds, as Stone received anything, what I chose as satisfaction for the money that I advanced.

"Stone was to return Neer one-quarter of the proceeds; I heard that agreement between them frequently.

"I think I made advances to the amount of $240; I kept an account of it.

"The arrangement between Neer and myself was, that if the stove put into my house should prove satisfactory, I should make an arrangement with him for the sale of the patent, and in the mean time the matter was to be in Stone's hands, and I was to make a reasonable deduction from Stone's salary.

60 "On the 23d of October, 1855, I had no interest in the heater, except as I have before said, to indemnify me for my advances. I

never before, or on October 23, 1855, authorized Mr. Stone to employ any person on my behalf as agent to sell the heater, and I had no interest in the heater except as above."

(From fol. 426:) "I think the money I furnished was in the early part of 1856. I ceased to assist him as early as February, 1856, I should think, or about that time."

(From fol. 428 to fol. 432.) "Stone said he had arranged with Hubbard to go to Massachusetts with Carver to sell the State for the stove; this must have been, I think, in December, 1855. He did not, I think, tell me of any other or further arrangement with Hubbard, for the sale of heater.

"He told me he had made two sales in Ohio with the assistance of Hubbard. He said he had made an arrangement at Cleveland with Hubbard, Brown and Tyler, and brought me a copy of the contract with them. I first saw it after October, 1855; about the 6th of March, 1856.

"Hubbard came to Troy from the East, to see something about a deed for Massachusetts for heater. I heard some conversation between him and Stone, but took no part in it. I presume I had some conversation with him; he was there a day and night; he went to Albany and returned with Mr. Lincoln. I saw Lincoln five or ten minutes in my office, also in the evening; he came to Troy just before sundown, and left the next morning; I think they left together.

"I took an order from Lincoln to furnish a set of patterns for the stove, at request from Stone.

"I had no interest in the proceeds of the heater, excepting to get back what I had advanced to Neer. I don't remember any conversa-
61 tion with Lincoln, except about a set of patterns which he gave me a written order to furnish; these were from new patterns got up by Neer in the fall of 1855; had nothing to do with it, except to furnish some means. I have not the slightest recollection of talking with Lincoln except about the patterns and Stone. I had no authority to tell him that what Hubbard had done was all right. I had no authority to tell him so, and to the best of my recollection I did not. Nothing was said between him and me about the sale of the rest of New England. I did not show him Neer's patent; I never saw it to this day. I did not tell him that Hubbard's doings should be ratified; Hubbard never told me then, and I never heard of such a thing at that time, as the sale of the rest of New England for the heater; he told me his purposes and plans, but nothing like that. He was very anxious to close up the sale with the Providence man, (Mass.,) that he might go back to his business at the West. Hubbard did not tell me about any further sales that he had begun or initiated, either for stove or plow. He did not mention the names of any parties that proposed to purchase heater except Butler & Smith, who had purchased. He said he had got through, and was about four weeks behind his time, and in a hurry to get to the West."

(From fol. 554.) "I notified both Stone and Neer that I did not feel disposed to advance any further, as the experiment had failed of the stove which Neer had put into my house. I cannot give the precise date. It was while Hubbard was in Providence. In the winter of 1856, I should say February, 1856. Stone wrote to Hubbard about that time, and the letter will explain."

(From fol. 466.) (Cross-examination.) "I think I testified to what these parties had told me took place in Detroit."

62 (From fol. 471.) (Cross-examination.) [Question as to whether any entry on the books of April 10, 1856, of $2,000 for the sale of heater, and $515 for sale of contract to Dickerman.]

"The entry is in Stone's handwriting. My impression is that I was not present. There were only two heaters sent, designed for Carver."

(From fols. 473½ '4.) "I had not received before the suit, proceeds of sale to Tift, in Ill., nor from Lyman $1,250, nor from Brown and Tyler. I dealt with Lyman in March, '56, and got property out of which I afterwards got the money.

"Did you procure testimony, or testify as to the sale to Tift? Stone did.

"Lyman? Yes. And Butler and Smith? Yes.

"I had a deed of real estate from Lyman before the suit commenced.

"(Mr. Brown produces the assignment from Neer called for.) This was executed, I think, in the latter part of the day, after tea, but an hour or two before the writ was made. I do not know that it was spoken of at the trial. My belief, from Mr. Kellogg's instructions, was that that was all the right I had to maintain the suit. I don't know whether the power of attorney of Stone from Neer was produced at the trial."

(From fol. 484.) "I never heard Stone say to Hubbard or to any person that I was a partner to my recollection. I know I never did without contradicting it. Stone ceased to be my attorney in August, 1857, not '56. His power of attorney was given up then and his salary ceased. He has since operated for me, more or less. I don't remember ever giving Stone any authority to sell the heater for New England on my account. I want to say this, I supposed Mr. Sanford had asked me the question, or that I had answered it not understandingly.

63 I supposed it might have referred to a sale to be made of the right unsold in August.

"I am not able to say whether the proceeds came into my hands. They did not as proceeds. Certain articles were transferred to me by Stone, but not as proceeds. They were transferred to me by purchase. I purchased them of Stone."

(Above concludes extracts from Harlow's minutes.)

The plaintiff then rested.

CHARLES K. BROWN recalled:

After assignment from Neer of the claim against Hubbard, entries were made on my books of the account against Hubbard assigned to me, and the testimony at fol. 471 of Boston minutes, refers to those entries. That was the only account which concerned the heater-right proceeds. While Stone was engaged about the New England sale, very likely property may have come to me here; a piano did, which I understood came out of sale. Nothing came that I understood as coming from the New England sale. Any property coming to my address was taken by Stone when he came home, and I had no more to do with it.

Q. What did you mean by saying, as appears at folio 484, (of Boston minutes,) "I am not able to say whether the proceeds came into my hands?"

A. I did not know what the proceeds of the sale were at the time. They did not come into my hands otherwise than as things may thus have come to my address, and then been taken by Stone, and as they may have come from such proceeds.

Exhibits 13 and 14 were then introduced by defendant, by consent.

The testimony was then closed, and thereupon the counsel for the respective parties presented their arguments upon the facts and law involved in said trial.

The exhibits so read in evidence are as follows:

64 *Plaintiff's Exhibit A.*

Whereas I, Charles Neer, of the city of Troy, Rensselaer County, and State of New York, did obtain letters-patent of the United States of America for certain improvements in the finish of fire-places and the warming of rooms, which letters patent bear date the 31st day of May, 1853:

Know all men by these presents that I, Charles Neer, have made, constituted, and appointed, and do by these presents make, constitute, and appoint Samuel S. Stone of the above-named place, my true and lawful attorney, for me and in my name, place, and stead, and for my use and benefit, to sell, dispose of, and convey, by deed or otherwise, the right of said patent for making and vending the article called "Neer's patent fire-place air-heater and grate," and the patent-right of the same, which article constitutes the improvement in the finish of fire-places, and the warming of rooms in the patent referred to above, for, to, and in all of the United States of America, I hereby giving and granting unto my said attorney, full power and authority to settle, receive, or collect all debts, dues, and demands due me by reason of such sales or otherwise, and to do and perform all other and every act and thing whatsoever requisite or necessary to be done in and about the premises, to all intents and purposes as I myself could do if personally present. I hereby ratify and confirm all that my said attorney shall lawfully do by virtue hereof.

In witness whereof I hereby set my hand and seal this 23d day of October, 1854.

CHARLES NEER.

Witness the signature,
CHARLES K. BROWN.

65 *Exhibit B.*

Dan. S. Dickerman,	Taunton,	Mass	$1,000
Jared Pratt,	"	"	1,200
A. E. Witherell,	"	"	500
J. L. Dickerman,	"	"	500
Zaccheus Sherman,	"	"	500
J. A. C. Hathaway,	Providence,	R. I	1,000
Cyrus Butler			500
I. G. Smith			500
Isaac Pitman,	Reading and Norton		500
T. A. Burt,	Taunton,	Mass	700
H. B. Witherell,	"	"	1,000
Levi Hale,	"	"	500
C. A. Hack,	"	"	600
Wm. H. Brown,	"	"	500
Stone			500
			$10,000

Exhibit C.

Supreme court.

CHARLES K. BROWN *against* LOOMIS H. HUBBARD. } Copy.

RENSSELAER COUNTY, *ss:*

CHARLES K. BROWN, of the city of Troy, in said county, being duly

sworn, says that he has a good cause of action against one Loomis H. Hubbard, of the State of Michigan, arising on the following facts,
66 and that within the last six weeks the above-named defendant, as the agent of this deponent, has sold and disposed of patent-rights of a heater or furnace called "Neer's furnace," in the States of Massachusetts and Rhode Island, to the amount of two thousand two hundred and forty-five dollars, and has received pay therefor in cash and goods; that by the agreement under which the said defendant acted as agent for this deponent, he was to receive for his services in making sale of said rights one-fourth part of the proceeds of such sales; that the said defendant now refuses to deliver over the goods or any part thereof, or pay over the cash or any part thereof, to this deponent, so received by him as aforesaid for such sales, unless this deponent will allow him one-half of the proceeds of such sales; that the said defendant now has in his possession seventeen hundred and thirty dollars in cash or drafts, which he neglects or refuses to pay over to this deponent, and which he conceals from this deponent.

And this deponent further says that the said defendant is indebted to him in the sum of one hundred and fifteen dollars for cash lent and advanced to him for his expenses in making sales of the patent-rights above mentioned.

This deponent further says that the said defendant is about to leave this State, and this deponent verily believes that he will lose his said debt, or the same will be very much endangered, if an order is not made for the arrest of the said defendant, and that a summons had been made out to be served on said defendant for said demand.

CHARLES K. BROWN.

Sworn to before me this 9th day of April, 1856.

JOHN MORAN,
Commissioner of Deeds, Troy, N. Y.

67 *Plaintiff's Exhibit D.*

Whereas Charles Neer, of the city of Troy, county of Rensselaer, and State of New York, did obtain letters-patent of the United States for a certain improvement in fire-places and stoves, which letters-patent bear date the thirty-first day of May, 1853; and whereas the said Charles Neer did, on the twentieth day of July, 1855, assign, sell, and set over to me all the right, title, and interest which he, the said Charles Neer, had in the said invention, as secured to him by said letters-patent: Now, therefore, I hereby constitute said Charles Neer my true and lawful attorney, for me and in my name to sell the right or rights, to manufacture and sell said improvement secured by said patent, hereby confirming any act which said Charles Neer may do in the premises as fully as though I was personally present.

In testimony whereof I have hereunto set my hand and affixed my seal this twenty-third day of July, 1855.

I. SCOTT.

Sealed and delivered in presence of—
CHARLES THOMPSON.
A. NEWTON YORK.

Plaintiff's Exhibit E.

Supreme court, Rensselaer County.

CHARLES K. BROWN
against
LOOMIS H. HUBBARD.

The complaint of the above-named plaintiff respectfully shows
68 to this court that the above-named defendant is indebted to him in the sum of three thousand two hundred and ninety-six dollars and thirty-five cents, which indebtedness arose as follows, that is to say: The above-named defendant, within the year last past, while in employ of above-named plaintiff as agent for selling the patent-rights of a heater or furnace, called Neer's furnace, and of the right to make, sell, dispose of, and use the same in the States of Massachusetts and Rhode Island, sold and disposed of the said patent-rights for the said plaintiff in the said States to the amount of three thousand dollars, or thereabouts, and received pay therefor, and in cash and goods; that the said defendant, although requested to account for and pay over the proceeds of the said sales to this plaintiff, has refused and still refuses so to do.

The plaintiff further says that said defendant is indebted to him in the further sum of $139.75 for goods, wares, and merchandise sold and delivered by said plaintiff to said defendant within the last six years, and for money lent and advanced and paid, laid out and expended by said plaintiff to and for the use of said defendant, and at his request, within the last six years.

The plaintiff further says that said defendant is indebted to him in the further sum of $120.30 on an account for goods, wares, and merchandise sold and delivered to said defendant within the last six years by Brown, Rich & Stone, a firm doing business in the city of Troy; that said plaintiff is now the lawful owner and holder of said account, by assignment for a valuable consideration.

The said plaintiff further says that said defendant is indebted to him in the further sum of $36.30 on account for goods, wares, and merchandise sold and delivered to said defendant, at his request, within the six
69 years last past, by Bosworth, Rich & Co., a firm doing business in the city of Troy, and for interest thereon; that said plaintiff is now the lawful owner and holder of said account by assignment for a valuable consideration.

And the said plaintiff further says that neither of the accounts above mentioned have been paid, nor any part thereof; nor has the money received by said defendant as the agent of this plaintiff been paid over to this plaintiff; but the said defendant is and remains justly indebted to the plaintiff in the said sum of three thousand two hundred and ninety-six dollars and thirty-five cents, with interest thereon from the 9th day of April, 1856, for which amount, with interest as aforesaid and the costs of this action, the said plaintiff demands judgment, together with such other or such further relief in the premises as the court shall think proper to grant, and as shall be agreeable to equity and the circumstances of this case, and in compliance with the statute in such case made and provided.

KELLOGG & PERCY,
Plaintiff's Attorneys, Troy, N. Y.

sworn, says that he has a good cause of action against one Loomis H. Hubbard, of the State of Michigan, arising on the following facts,
66 and that within the last six weeks the above-named defendant, as the agent of this deponent, has sold and disposed of patent-rights of a heater or furnace called "Neer's furnace," in the States of Massachusetts and Rhode Island, to the amount of two thousand two hundred and forty-five dollars, and has received pay therefor in cash and goods; that by the agreement under which the said defendant acted as agent for this deponent, he was to receive for his services in making sale of said rights one-fourth part of the proceeds of such sales; that the said defendant now refuses to deliver over the goods or any part thereof, or pay over the cash or any part thereof, to this deponent, so received by him as aforesaid for such sales, unless this deponent will allow him one-half of the proceeds of such sales; that the said defendant now has in his possession seventeen hundred and thirty dollars in cash or drafts, which he neglects or refuses to pay over to this deponent, and which he conceals from this deponent.

And this deponent further says that the said defendant is indebted to him in the sum of one hundred and fifteen dollars for cash lent and advanced to him for his expenses in making sales of the patent-rights above mentioned.

This deponent further says that the said defendant is about to leave this State, and this deponent verily believes that he will lose his said debt, or the same will be very much endangered, if an order is not made for the arrest of the said defendant, and that a summons had been made out to be served on said defendant for said demand.

CHARLES K. BROWN.

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JOHN MORAN,
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In testimony whereof I have hereunto set my hand and affixed my seal this twenty-third day of July, 1855.

J. SCOTT.

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Supreme court, Rensselaer County.

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The plaintiff further says that said defendant is indebted to him in the further sum of $139.75 for goods, wares, and merchandise sold and delivered by said plaintiff to said defendant within the last six years, and for money lent and advanced and paid, laid out and expended by said plaintiff to and for the use of said defendant, and at his request, within the last six years.

The plaintiff further says that said defendant is indebted to him in the further sum of $120.30 on an account for goods, wares, and merchandise sold and delivered to said defendant within the last six years by Brown, Rich & Stone, a firm doing business in the city of Troy; that said plaintiff is now the lawful owner and holder of said account, by assignment for a valuable consideration.

The said plaintiff further says that said defendant is indebted to him in the further sum of $36.30 on account for goods, wares, and merchandise sold and delivered to said defendant, at his request, within the six years last past, by Bosworth, Rich & Co., a firm doing business
69 in the city of Troy, and for interest thereon; that said plaintiff is now the lawful owner and holder of said account by assignment for a valuable consideration.

And the said plaintiff further says that neither of the accounts above mentioned have been paid, nor any part thereof; nor has the money received by said defendant as the agent of this plaintiff been paid over to this plaintiff; but the said defendant is and remains justly indebted to the plaintiff in the said sum of three thousand two hundred and ninety-six dollars and thirty-five cents, with interest thereon from the 9th day of April, 1856, for which amount, with interest as aforesaid and the costs of this action, the said plaintiff demands judgment, together with such other or such further relief in the premises as the court shall think proper to grant, and as shall be agreeable to equity and the circumstances of this case, and in compliance with the statute in such case made and provided.

KELLOGG & PERCY,
Plaintiff's Attorneys, Troy, N. Y.

Exhibit No. 1.

TROY, *March 6th*, 1856.

C. K. BROWN, Esq.:

Will please send us one parlor-heater stove and a set of iron patterns of the same. You may send the stove to C. Butler, Providence, via Worcester. Send the patterns as soon as you get them out to Norton Furnace Company, Taunton, Mass:, via Boston. The price to be $100 for the patterns and stove.

Yours, &c., NORTON FURNACE CO.,
Per A. A. LINCOLN, JR.

70 *Exhibit No. 2.*

We have this day received from Loomis H. Hubbard a draft for ($500) five hundred dollars, made by T. R. Green, cashier of the Pawtuxet Bank at Providence, Rhode Island, on the cashier of the Bank of Commerce, payable on the 26th day of April, 1856. Also one gold watch, M. J. Tobias & Co., makers, No. 4673. Also a bill of sale of one piano, made by D. S. & J. L. Dickerman to said Hubbard, dated March 31st, 1856, and a bill of sale from said Hubbard to us of the same, which piano we are to send for and demand, and if delivered to us, to keep and dispose of as hereinafter stated. We have also received of said Hubbard one thousand teeth. All of said property so received, and said piano, if received, we hereby agree to keep until the final decision of a suit commenced by Charles K. Brown against said Loomis H. Hubbard, on the 9th day of April, 1856, and then to deliver the same, or the avails thereof, to the party in said suit who shall be adjudged to be entitled to the same.

Dated April 11th, 1856.

MILLARD & KING.

Exhibit No. 4.

TROY, *Dec. 13th*, 1855.

L. H. HUBBARD, Esq.:

Yours, dated at N. Y., is received. Mr. Neer has two heaters fixed up, as suggested by Mr. Stone. He expected Mr. Carver to call for them. If you wish them forwarded you can tell Mr. Carver to forward the money for them to me, and I will get them and send them on at once. Mr. Neer says if he sends them at $20 each they must be cash.

Yours, in haste, C. K. BROWN.

71 *Exhibit No. 5.*

TROY, *Dec.* 21, 1855.

Mr. L. H. HUBBARD:

DEAR SIR: Yours of the 18th is received and noticed, and also your former letter. The stoves have not been shipped, for the reason that the cash was not sent to pay for them, and we have nothing to pay for them in hand in which you are interested, except some western notes, and the Trojans will not take them in payment for stoves. Now, Mr. Neer is a poor man, and wants his pay as fast as the stoves are delivered. Also, we expected, as Mr. Stone informed us, that Mr. Carver would either call and pay for them, or else send the money to me for

them. I am willing to work, but must be excused from furnishing money to buy stoves to send out on such expeditions, and this had better be understood in the start; and to save time hereafter, you will make your calculations to send the money with all orders for stoves, as we do not make them. I will this time, however, pay Mr. Neer for the two stoves, and send them to-day by the Troy and Boston R. R., marked to you at Boston, and will expect you to send the money as soon as you can make a raise. I will also send the plow marked to you with the heaters; but you must remember that you must do something more than pay your expenses to enable me to fill your orders.

C. K. BROWN.

Exhibit No. 6.

NEW YORK, *Dec. 12th*, 1855.

CHARLES K. BROWN, Esq.:

GENT.:—You will please ship the two stoves that you have in
72 readiness for David Carver and myself to Boston, and we shall be there on the 14th of this month and send your bill of them, and we will see what we can do in that great city.

Yours, in haste, L. H. HUBBARD.

I left S. S. Stone in Cleveland on the 7th, and he told me that he thought that he should go to Detroit. Let me hear from him.

Exhibit No. 7.

BOSTON, *Dec. 14th*, 1855.

S. S. STONE:

SIR: I have just reached this place. Went to the post-office, expecting a letter from Troy. I wrote to have the two stoves shipped to this place, but got no word. I expect Mr. Carver home Monday, and we shall want the stoves before we can make a move. I think that I have a customer for the stove; and if it is not sent, let it come, and also the lowest prices that they can be bought for in Troy, as the price will make a difference about the sale. I think you had better send me D improved plow at the same time, and come yourself, as I think that I have found a customer, and I want to close up a trade at once. Write by return mail. I am at the American. Direct care of the American, if you please.

L. H. HUBBARD.

Exhibit No. 8.

TAUNTON, *Feb. 20th*, 1856.

CHARLES K. BROWN & CO.:

SIR: The bearer, Thomas J. Cogshall, is agent for the Boston
73 Stove Co., of Summer street. Want' to make inquiries about plows and patterns, and also wants, if he should conclude to trade, he wants to see Mr. Deoveast to take charge of the plow department. The company he represents is good beyond a question.

With respect, L. H. HUBBARD.

Exhibit No. 9.

MT. CLEMENT, *April 18th*, '56.

WM. M. CAMBELL:

SIR: I have just got home, and your wife tells me that you are in

New York, and I thought I should like to hear from you. I find that the suit commenced by Degraft and Reudrick will come on in some four weeks, and you must be here without fail. I wish I could see you before you settle with Brown and Stone. I am through as to traveling with Stone. I can help you to three or four trades, but will not Stone. Write me when I can get a letter to you before you settle with them, for it will be to your advantage.

L. H. HUBBARD.

Exhibit No. 10.

TAUNTON, *Feb.* 20, 1856.

S. S. STONE:

SIR: I am still in this place, and am bound to make a trade before I leave here. I shall close up this week. Shall be in Troy about Monday or Tuesday next. I expect Mr. Cogshall will be in your place to see about the plow business Don't let him have patterns unless he
74 will buy this county at $500. Of course you will not let him see this letter nor say a word. I could not get rid of him any other way, and he wants to make plows for Michigan. I told him that you would not sell him patterns to make plows unless he bought territory. I have another man will come with me Monday—that is, Mr. Tuckerman. The company he is agent for is good for all he will contract for. Try him for the State. He is not for trade, and if you can sell him let it slide, but keep things all straight for me, for he may be in my way here.

Yours,

L. H. HUBBARD.

Exhibit No. 11.

FEBRUARY 7*th*, 1856.

S. S. STONE:

I have to say that I have got along very well, and now my bill here is over $50, and they want the money. I cannot get it until I close up the trade at Taunton, and unless you will let me draw on you I cannot pay them. I do not like to tell them I cannot pay them, and if I tell them at Taunton I am out of money it will be in my way, I am afraid, and I would not ask Carver if I was turned out of doors. I came up here to-day to see some stove-men, and all appears to go well. Mr. Carpenter, stove-man, will go down and see it, and he buys all his castings at the Taunton foundry, and he tells me if Hathway says it is right he will go in, and I know that he will set it up straight. I shall be here until Friday, and I want you to write me here and say whether I shall draw on you for $50 or not. If you are not willing, I shall get along some way or other. I have just got a letter from Dr. Moore. He says that he has a fair prospect for a trade. Write me on receipt of this.

Respectfully, yours,

L. H. HUBBARD.

75 *Exhibit No.* 12.

Whereas Charles Neer is the patentee of a certain fire-place and heater that has been sold on the right to use and make the same in and

for the State of Massachusetts, by Loomis H. Hubbard, for the sum of nearly $2,500, and has received the money and property in payment for the same, and hold' the property and money so received for said patent which belongs to me:

Now, therefore, for and in consideration of one dollar to me in hand paid, I do hereby sell, assign, transfer, and set over to Charles K. Brown all my right, title, interest, claim, and demand of, in, and to the said property and money so received and held by Loomis H. Hubbard, and do hereby authorize him or his assigns to collect the same in his name, or otherwise, as he may think proper, but at his own cost and expense.

April 9th, 1856.

CHARLES NEER,
By S. S. STONE, *Attorney.*

In presence—
J. T. PERCY.

Exhibit No. 13.

TROY, *Jan'y 5th*, 1855.

MR. S. S. STONE:

DEAR SIR: Your letter dated Bonnie Doon, Dec. 28th, just received. I think it must have lain over somewhere. This is the only one that I have received since the one of Nov. 27th. I have done all in my power to forward a heater, but have been kept back for want of castings. Mr. Eddy told me, some time before I got my patterns ready, that he should run his foundry and would furnish me; but we have had considerable cold weather, and he has done merely nothing. The others were
76 most entirely closed up for the winter before I was ready. I made out to get one set of castings from Mr. Eddy, but they were not perfect, as is apt to be the case for the first time or two that the patterns are moulded in large thin pieces. I used them, however, for myself, expecting more immediately, and better ones, and waited with hopes daily. Mine I got up two weeks to-day, and I held on for him until last Saturday, when I took the patterns to a small furnace near Mount Olympus, where I think the prospects are fair; but New Year being on Monday last they were stopped off two or three days, but they are now running, and I have just received one set to-day, which I hope to have ready to-morrow. They are the first moulded at that foundry, and are not as perfect as I could wish; but I do not know that there is anything to injure in use or appearance; will know to-morrow when set up. If all is right will forward it at once. I have had my patience tried to its utmost forbearance, but the alterations have been more than I had anticipated, but are well made and exceed my former calculations in its operations. I cannot see how I could have looked for anything better, and feel confident that you will be much pleased with the article, and find it to give very general satisfaction. I hope you will not be disarranged by the long delay. I will ascertain the most expeditious way to forward one on, so as to have it arrive as soon as possible at Fredericksburgh. I have the power of attorney returned to me from Washington, and if you wish will enclose it to you as you may advise. Please write immediately on receipt of this.

Yours, truly,

CHARLES NEER.

P. S.—Mr. Hyde has given me several calls for a little help on the pattern account, but I have not been able to help him, as I have been in the receipt of very little money, and if you can help a little it will come exceedingly good.

C. N.

'7 *Exhibit No.* 14.

TROY, *Nov. 15th*, 1854.

S. STONE, Esq.:

DEAR SIR: Your favor of the 11th came to hand to-day. I have given all due diligence to the heater, but have not got ahead as fast as I had hoped from the estimate of time made by Mr. Hyde, the pattern-maker. I have the patterns at the furnace, and hope to get off a set of iron ones to-morrow. Should I have no unfor'seen delay, I think I shall forward you a heater some day next week. I feel exceedingly anxious to do so, but you have had enough to do, I presume, in getting up patterns, and getting them through the furnace and fitted up, to make some allowance for me if I should not realize my present hopes. You may assure the Slaughters that it will be forthcoming with the least possible delay, and with all the necessary directions for setting and using.

After I once get this set of patterns fairly through, shall be able to send you a sample heater at a very short notice, and I think they will be much pleased with the article. I have very much improved it, and at rather more cost than I had calculated, but when I got at it, was unwilling to injure so good a thing for a little extra on a set of patterns. Mr. Hyde is, like myself, a man of small means; and if you can make a lucky hit, and forward, say $50, it will be duly appreciated. My plaster sales will not commence for some weeks, which, with all my last year's mishaps, leaves me rather helpless to do as I would wish. Please let me hear from you frequently.

Yours, in haste, but truly,

CHAS. NEER.

78 *Exhibit No.* 15.

(The following form subjoined copy of said letters-patent.)

Whereas I, Charles Neer, of Troy, Rensselaer County, in the State of New York, did obtain letters-patent of the United States for a certain improvement in the finish of fire-places and warming of rooms, which letters-patent bear date the 31st day of May, 1853: Now know ye, that for and in consideration of the sum of dollars, to be paid to me as hereinafter specified, viz, , I hereby assign, sell, and set over unto , of the , county of , State of , all of my right, title, and interest in and to the above-described improvement in the finish of fire-places and the warming of rooms, in the , and in no other place or places, to have and to hold the same for or legal representatives or assigns, as fully as the same would have been held and enjoyed by me if this sale had never been made. But it is expressly agreed by and between the parties hereto, that if the purchase-money aforesaid is not paid to said Neer or his attorney, *or* at the time above specified, or within days thereafter, then this instrument shall be void.

In witness whereof, have hereunto set hand and seal this day of , one thousand eight hundred and .

In presence of—

On the submission of this action to said referee, the counsel for Brown insisted before the referee and requested him to find in his report severally as follows:

1st. That the said four sales by Stone, and the deeds given thereon, did not, nor did either thereof, affect Scott's interest in said patent.

79 2d. That as neither such sale or deed was in Scott's name, or purported to convey or affect any right of his, it was not a subject of adoption or affirmance by him.

3d. That if Scott could affirm or adopt either such sale or deed, so as to become entitled to any of its proceeds, nothing less than an open adoption or affirmance made known to the parties to be affected thereby, would suffice to effect that end.

4th. That Stone was bound, as Neer's attorney, to account directly to him for his share of the proceeds of sales.

5th. That Stone could at will transfer to Brown, and that Brown could freely bargain for and receive any of Stone's share of the proceeds of sales without Brown's becoming liable therefor to Neer or Scott.

6th. That any arrangement between Stone and Brown whereby Brown was to have anything from Stone's share of proceeds of sales, either in payment of debt or in consideration of services, or for other consideration, would not render Brown liable to Neer or Scott for any proceeds received by Brown under such arrangement, so long as same did not exceed Stone's share, as between him and Neer or Scott.

7th. That any such arrangement between Stone and Brown would not render Brown liable to Neer or Scott for any proceeds received by Stone and not coming to Brown's hands.

8th. That any arrangement between Stone and Brown, whereby Brown stood toward the purchasers at any sale as principal, and Stone and his associates as Brown's agents in its negotiation and conduct, nevertheless left Stone as Neer's immediate agent and attorney as to proceeds of such sale received by him, and would not and did not subject Brown to any liability to Neer or Scott for any of such proceeds received by Stone and not coming to Brown's hands.

80 9th. That though Stone, Hubbard, and Campbell stood toward Cyrus Butler & Co. as Brown's authorized agents as to the last sale, such fact would not and did not render Brown liable to Neer or Scott for proceeds which Stone received from that sale and did not come into Brown's hands.

10th. That though Brown, as between him and Cyrus Butler & Co., was entitled to the proceeds of the sale to them, yet, as between him and Neer, he could deal with Stone, as Neer's attorney, and let him receive such proceeds, and would not be liable to Neer or Scott for any thereof, so received by Stone and retained by him.

11th. That any liability of Brown to Scott for proceeds of Stone's sales is limited to such of said proceeds as came to Brown's hands in excess of Stone's share thereof.

12th. That Brown is not liable to Neer or Scott for any money or property which Stone retained in his hands from receipts by him in payment for rights conveyed by him as attorney for Neer.

13th. That Scott has no rights against Brown beyond what Neer would have had but for his deed to Scott, and that any rights of Scott are allied with liability on his part for Neer's acts and liabilities in the same transactions.

But the referee, as to each of said requests separately, refused so to find otherwise than as contained in his report, & to each such refusal defendant Brown duly excepted.

The foregoing is a full statement of the trial of this action, and contains all the material testimony given thereon.

Afterwards the said referee made his report herein, as set forth in foregoing judgment-roll; and the said defendant Brown duly excepted to said report, as follows:

81 Supreme court.

ISAIAH SCOTT
against
CHARLES K. BROWN, SURVIVOR, &c. } Exceptions to referee's report.

The said defendant, Charles K. Brown, excepts to the report herein of Charles F. Tabor, esq., referee, and to each and every part thereof, and said defendant excepts separately to each finding of fact and conclusion of law contained in said report, and said defendant specially excepts as follows:

1. Said defendant excepts to so much of the finding of said referee concerning Neer's renewal of Stone's power of attorney as finds that "the defendant used his influence with Neer to induce him to make this renewal;" and said defendant separately excepts to so much of said finding as finds that at the time of such renewal the sale in said report mentioned of the New England States other than Massachusetts, was not fully completed.

2. Said defendant excepts to the finding of said referee that "Stone was the defendant's agent for the sale of these rights."

3. Said defendant excepts to the finding of said referee that "Hubbard and Campbell mentioned in the testimony were in the defendant's employ under Stone."

4. Said defendant excepts to the finding of said referee that Campbell mentioned in the testimony was in defendant's employ.

5. Said defendant excepts to the finding of said referee that "the power of attorney was given to Stone as defendant's agent."

82 6. Said defendant excepts to the finding of said referee that "this I find principally from the acts, admissions, and declarations of the defendant."

7. Said defendant excepts to the finding of said referee that "it was made to him as a convenient way of doing the business, as Stone was to do the traveling."

8. Said defendant excepts to the finding of said referee that the power of attorney from Neer to Stone was made to him as a convenient way of doing the business.

9. Said defendant excepts to any finding of said referee that there was a contract or agreement between Neer and said defendant concerning the selling of territorial rights to Neer's patent.

10. Said defendant excepts to any finding of said referee that there was a contract or agreement between Neer and said defendant.

11. Said defendant excepts to the finding of said referee concerning division of proceeds of sales of rights that after a division or partial division of the proceeds of the two first or western sales, Neer "manifested dissatisfaction, and refused to go on with the arrangement unless he was paid one-half the proceeds or sales."

12. Said defendant excepts to the finding of said referee, in connection with the matter in last exception mentioned, as follows, "and that one-half was to be paid is corroborated by other testimony."

13. Said defendant excepts to the finding of said referee that "on the 20th July, 1855, Neer sold and conveyed this patent to the plaintiff."

14. Said defendant excepts to the finding of said referee that "the plaintiff had knowledge of these sales at or about the times when made, and how and by whom made," and said defendant excepts separately to each particular of such finding, and specially excepts to so much thereof as finds that plaintiff so knew how such sales were made.

83 15. Said defendant excepts to the finding of said referee concerning the sales in last above exception referred to, that "the plaintiff did not object to them."

16. Said defendant excepts to the finding of said referee that "the defendant knew about the plaintiff's ownership of the patent, or of his claim to own it, soon after the Detroit sales."

17. Said defendant excepts to the finding of said referee that "Stone was informed by Neer before closing the New England sale, that he was acting under a power of attorney from the plaintiff."

18. Said defendant excepts to the finding of said referee that "a portion of the proceeds of these sales, both in money and kind, came to the hands of the defendant and said Stone," and specially excepts thereto so far as same involves a finding that any proceeds of either sale, except that as to Massachusetts, came to the hands of said defendant.

19. Said defendant excepts to the finding of said referee that "the defendant made some payments of money to Neer on account of money received by him on such sales," and specially excepts thereto so far as same involves a finding that either such payment was of money received by said defendant from proceeds of either sale other than that as to Massachusetts.

20. Said defendant excepts to the finding of said referee that the defendant "made a division with him of some of the property received from the Detroit sales."

21. Said defendant excepts to the finding of said referee in these words, "Neer acting on such division as the agent of the plaintiff, and for him."

22. Said defendant excepts to the finding of said referee that "it does not appear that the purchasers, or either or any of them, of the

84 four several rights specified have been disturbed in their title to said rights, or the use or sale thereof."

23. Said defendant excepts to the finding of said referee that it did not appear that any of such purchasers were so disturbed "on account of any defect in their titles."

24. Said defendant excepts to the decision or conclusion of law of said referee, "that the defendant is bound to account for the money and property received by him and the said Stone, or either of them, on or from such sales, and that he may be required to account therefor by the plaintiff as the owner of said patent at the times said sales were made, and who did not disaffirm, but has on the contrary affirmed the same," and said defendant also excepts separately to each part thereof.

25. Said defendant, as to the conclusion in last above exception referred to, also excepts to so much thereof as finds or concludes that said defendant is bound to account for any money or property received by said Stone from either such sale; and said defendant separately excepts to so much of said conclusion as finds or concludes that said defendant may be required to account by the plaintiff; and said defendant separately excepts to so much of said conclusion as finds or concludes that said defendant may be so required by the plaintiff to account for money or property received by said Stone from such sales; and said defendant also separately excepts to so much of said conclusion as finds or concludes that the plaintiff did not disaffirm the sales in said con-

clusion referred to; and said defendant further separately excepts to so much of said conclusion as finds or concludes that the plaintiff affirmed such sales.

26. Said defendant excepts to the decision or conclusion of said
85 referee that "an order must therefore be entered for the taking of an account of all such money and property, and a reference had for that purpose, and upon the coming in and filing of the report of the referee upon such accounting, the plaintiff will be entitled to judgment for the one-quarter of all such money so received by the defendant and said Stone, or either of them, and the value of one-quarter of all the property so received by him and said Stone, or either of them, not heretofore accounted for or paid over to him or said Neer from the two first of said sales made at Detroit, and for the one-half of all such money and property received from the two last sales not paid over or accounted for as aforesaid, with the interest thereon, together with his costs and disbursements;" and said defendant separately excepts to each part thereof, and excepts specially to that part thereof which decides or concludes that an order must be entered for the taking of an account of all such money and property; and said defendant also so excepts to that part of such conclusion which decides that the plaintiff will be entitled to judgment for one-quarter of the money and the value of one-quarter of the property received by defendant and Stone, or either of them, from the two first of said sales, and not heretofore accounted for or paid over to the plaintiff or Neer. And said defendant also so excepts to that part of such conclusion which decides that the plaintiff will be entitled to judgment for one-half of all such money and property received from the last two sales not paid over or accounted for as in such conclusion stated, with the interest thereon. And said defendant also so excepts to so much of said conclusion as decides that said plaintiff will be entitled to judgment for his costs and disbursements.

G. B. KELLOGG,
Attorney for Defendant Brown.

86 The plaintiff entered up judgment, ex parte, upon said referee's report, as appears by said judgment-roll, and said defendant in due season appealed from said judgment to the general term of this court, and procured this case and exceptions to be made and settled, and also noticed a motion thereon before said general term for a new trial. And the counsel for said parties mutually agreed that such practice for a review of said trial was correct, and that further proceedings on said judgment should await such review, and that any error in such practice should not prejudice a full review of said trial, or any substantial right of either party.

87 *Case and exceptions No. 2.*

Supreme Court.

ISAIAH SCOTT, PLAINTIFF,
against
CHARLES K. BROWN, SURVIVOR, &C., DEFENDANT.

The foregoing case is to be taken as part of this case.

The foregoing appeal was brought on for argument at general term and was dismissed as premature; but the motion for new trial was not

dismissed; and the parties mutually agreed that same might remain pending and be argued with an appeal from any final judgment herein.

April 30, 1872, plaintiff obtained an order at special term referring to said Charles F. Tabor as referee, the accounting provided for in his report; but Tabor declined to act as such referee, and June 15, 1872, plaintiff obtained an order at special term substituting R. A. Parmenter, esq., as referee to take such accounting.

March 15th, 1873, by special-term order of that date, said judgment entered August 1st, 1871, and said orders of April 30, 1872, and June 15th, 1872, were duly vacated and the following separate order granted:

Order No. 2.

At a special term of the supreme court held at Troy, March 15th, 1873.

Present: Hon. C. R. Ingalls, justice.

83 Supreme court.

ISAIAH SCOTT
against
CHAS. K. BROWN, SURVIVOR OF SAMUEL STONE.

On filing the report of Charles F. Tabor, esq., sole referee herein, and on the papers and proceedings herein, and due notice of motion to confirm said report having been given by plaintiff;

And after hearing Mr. A. K. Hadley, counsel for the plaintiff, and Mr. Jno. B. Gale, counsel for the defendant, it is ordered:

1st. That said report be, and the same hereby is, confirmed.

2d. That said defendant Brown do account to said plaintiff for the money and property received by him and said Stone, or either of them, from four sales of territorial rights, under letters-patent of the United States to Chas. Neer, dated 31st May, 1853, for fire-place air-heater and grate, which said sales were made, one to Robert R. Wallace, one to Leland Crandall, and another of the State of Massachusetts, and the other the New England States other than Massachusetts; and after hearing the suggestion of Chas F. Tabor, esq., referee declining to act further as the referee in this action;

3d. That Roswell A. Parmenter, esq., be substituted as referee herein in the place and stead of said Tabor, and that the accounting of said Brown herein ordered be had before said Parmenter as referee.

4th. That upon the making and confirmation of his report, said plaintiff have judgment against said Brown for one-fourth of all monies and the value of one-fourth of all property so received by him and said Stone, or either of them, not heretofore accounted for, or paid
89 over to said plaintiff or said Neer, from said sales to said Wallace and said Crandall, and for one-half of all such monies or property received from the said other two sales, nor paid over or accounted for as aforesaid, with interest thereon, besides the costs of this action.

C. R. INGALLS,
Jus. Sup. Court.

Defendant Brown duly appealed from said Order No. 2, and the parties mutually agreed that such appeal might be argued with any appeal herein from final judgment, and meanwhile remain in suspense, except that no question should be taken or raised as to the correctness of the practice appointing Mr. Parmenter referee.

Afterwards hearings were had before said Parmenter under said Order No. 2, and due proof was made before him of the several facts set forth in his report, as hereinafter contained.

On said hearings, defendant Brown duly offered to prove various items of expense necessarily incurred by him in his suit against Hubbard (named in the report) in collecting the amounts received by said Hubbard from the sale to Butler & Smith, (being of the territorial right of Massachusetts,) and that the net amount actually received by defendant Brown from said sale, after deducting such expense and after allowing to said Hubbard for his services one-fourth of the proceeds of said sale, as agreed between said Stone and him, was less than $1,000.

Plaintiff objected to such evidence as immaterial and because, by the report of Taber, referee, Brown stands liable to account for the amount received by his adjudged agent, Hubbard.

90 The referee sustained the objection and excluded the evidence and proof so offered; and thereto defendant Brown duly excepted.

Afterwards said referee made his report as follows:

Supreme court.

ISAIAH SCOTT
against
CHARLES K. BROWN, SURVIVOR OF SAMUEL S. STONE.

I, Roswell A. Parmenter, referee herein, appointed by order dated March 15th, 1872, as therein appears, do report as follows:

1. Nothing appeared before me as to any receipts from the sales to Robert R. Wallace and to Leland Crandall, referred to in said order.

2. From the sale of the territorial right of Massachusetts, referred to in said order, Hubbard (referred to in the report of C. F. Tabor, esq., referee) received proceeds as follows:

April, 1856.	Cash	$1,730 00
	Piano, worth	92 25
	Amounting to	1,822 25

3. Of the proceeds so received by Hubbard, defendant Brown, in his suit against said Hubbard, received:

May 1, 1856	$1,000 00

4. Of the amount so received by Brown, he paid to Charles Neer, (the patentee named in said Tabor's report:)

May, 1856	$100 00
July, 1856	25 00
Amounting to	125 00

5. Said Neer was also then indebted to said Brown for other
91 cash advances and for merchandise to the amount of $150.41, and afterwards became indebted in the same matters to said Brown, as follows:

October 30, 1857.	For storage	$17 50
May 1, 1860.	For storage	26 18
	Amounting to	43 68

6. The sale referred to in said Tabor's report, of the right to the New England States other than Massachusetts, was effected by said Stone, with the aid of Campbell, named in said report, and was effected by getting up an association to purchase such right; and in getting up said association and in procuring subscriptions thereto D. J. Dickerman co-operated, and became an early subscriber, and aided in getting others to subscribe, and did so under an arrangement with said Stone that he should be paid therefor out of the amount which should be received from such subscription.

7. Said Stone received from the subscriptions to said association, in cash and property, in the fall of 1856, $3,580.64, and paid out of same to said Dickerman, for his said services, the reasonable amount of $345; leaving $3,235.64, as the amount realized by said Stone from said subscriptions.

In accordance with the foregoing facts and with the facts and law as found in said report of C. F. Tabor, esq., I find further as follows:

8. Said defendant is indebted to said plaintiff as follows:

April, 1856. One-half of amount received as aforesaid by Hubbard			$911 12
Less amount paid to Neer	$125 00		
And advances and merchandise	150 41		
		275 41	
Leaving a balance of			635 71
September, 1856. One-half amount received as aforesaid by Stone			1,617 82
Making together			2,253 53
92 Less Neer's debt to Brown—			
October 30, 1857	17 50		
May 1, 1860	26 18		
		43 68	
Leaving a balance of			2,209 85
For interest as follows:			
On $635.71 from April 15, 1856			784 94
On $1,617.82 from September 15, 1856			1,950 43
Making together			4,945 22

And for said amount of $4,945.22, said plaintiff Scott is entitled, as aforesaid, to judgment against said defendant Brown.

Dated December 5th, 1873.

R. A. PARMENTER, *Referee.*

At a special term of the supreme court, held at Troy on the 31st day of December, 1873.

Present, Hon. C. R. Ingalls, justice.

Supreme court.

ISAIAH SCOTT
against
CHARLES K. BROWN, SURVIVOR, &C.

On reading and filing the report herein of R. A. Parmenter, whereby,

on the basis of the previous report herein of C. F. Tabor, he finds that said defendant is indebted to said plaintiff in the sum of $4,945.22, and on the proceedings heretofore had in this action, and after hearing A. K. Hadley, esq., for plaintiff, and John B. Gale, esq., in opposition; it is hereby

Ordered, that said report of R. A. Parmenter be confirmed, and that said plaintiff Scott do recover of said defendant Brown the sum of $4,945.22, besides costs.

C. R. INGALLS,
Jus. Sup. Court.

93 From last above order said Brown duly appealed; and the parties agreed that such appeal might be argued with the appeal herein from final judgment, and meanwhile remain in suspense.

Thereupon said plaintiff entered judgment as follows:

Supreme court.

ISAIAH SCOTT
against
CHARLES K. BROWN, SURVIVOR, &C.

On filing the pleadings and proceedings herein, and the order for judgment dated December 31st, 1873, whereby judgment is ordered for plaintiff against defendant for $4,945.22, besides costs:

Now, on motion of A. K. Hadley, plaintiff's attorney, it is adjudged that said plaintiff Isaiah Scott do recover of said defendant Charles K. Brown the said sum of $4,945.22, and for plaintiff's costs, $563.16, making together the sum of $5,508.38.

(Entered January 10th, 1874.)

From said judgment said Brown duly appealed to the supreme court at general term, and procured the foregoing case to be settled. And the said parties mutually agreed that the practice pursued in this action was mutually understood as permitting review by the supreme court at general term, and by the court of appeals, of the whole trial before said Tabor, and of his report, and the exceptions thereto, and also of said Parmenter's report, and of the several orders appealed from as above stated; and that, in default thereof, all proceedings subsequent to the report of said Tabor shall be vacated.

94 Foregoing case, &c., is hereby agreed to.

A. K. HADLEY,
Plaintiff's Attorney.
G. B. KELLOGG,
Defendant's Attorney.

Supreme court.

ISAIAH SCOTT
against
CHARLES K. BROWN, SURVIVOR, &C.

Take notice that said defendant, Charles K. Brown, survivor, &c., hereby appeals to the supreme court at general term from the judgment herein entered in Rensselaer, County clerk's office on the 10th day of

January, 1874, in favor of said plaintiff against said defendant, and from every part of said judgment.

G. B. KELLOGG,
Attorney for Defendant Brown, Troy, N. Y.

TROY, *January 12th*, 1874.

To A. K. HADLEY, Esq.,
Plaintiff's Attorney.

WILLIAM LAPE, Esq.,
Rensselaer County Clerk.

Afterwards the said plaintiff Isaiah Scott having died, this action was, by order duly granted, revived and continued in the name of Frank S. Atwell, administrator, &c., of Isaiah Scott, as plaintiff.

95 At a general term of the supreme court of the State of New York, held in and for the third judicial department, at the court-house in the city of Elmira, in the county of Chemung, on the fifth day of May, 1874.

Present:

Hon. Theodore Miller, presiding justice.
" Douglas Boardman, } associate justices.
" A. B. James, }

FRANK S. ATWELL, ADMINISTRATOR OF ISAIAH Scott, deceased,
against
CHARLES K. BROWN, SURVIVOR.

Judgment affirmed, with costs.
Opinion by Boardman, justice.

JOHN G. COPLEY, *Clerk.*

In supreme court, Rensselaer County.

FRANK S. ATWELL, ADMINISTRATOR, &C., respondent,
against
CHARLES K. BROWN, SURVIVOR, &C., appellant.
} Judgment 27th May, 1874.

The appeal from the judgment entered in this action the 10th day of January, 1874, having been brought to argument and affirmed at the general term of this court held at the court-house in the city of Elmira on the 5th May, 1874, it is now ordered and adjudged that the said judgment be, and the same hereby is, in all things affirmed, and that the respondent, Frank S. Atwell, administrator, &c., recover of the appellant, Charles K. Brown, two hundred and forty-one dollars and seventy-five cents for costs of this appeal.

96 Supreme court.

FRANK S. ATWELL, ADMINISTRATOR, &C., OF Isaiah Scott, deceased, respondent,
against
CHARLES K. BROWN, SURVIVOR, &C., appellant.

To A. K. Hadley, esq., plaintiff's attorney, and William Lape, clerk of Rensselaer County.

Take notice that the defendant, Charles K. Brown, above named,

hereby appeals to the court of appeals from the judgment of the general term herein entered in the Rensselaer County clerk's office on the 27th day of May, 1874, affirming the judgment entered herein on the report of the referee, with $241.75 costs, and from every part of said judgment.

Dated Troy, June 11, 1874.

G. B. KELLOGG,
Defendant's Atty., Troy, N. Y.

RENSSELAER COUNTY,
Clerk's Office, ss:

I certify that the foregoing is a copy of the judgment-roll and of the notice of appeal therefrom, on file in this office, and of the whole thereof.

Witness my hand and official seal.

[L. S.] WM. LAPE, *Clerk.*

Supreme court, third department, Albany general term, March, 1874.

FRANK S. ATWELL, ADMR., &C., I. SCOTT,
against
CHARLES K. BROWN, SURVIVOR, &C.

Miller, P. J.
Bockes and Boardman, J. J.

Appeal from judgment for plaintiff upon the report of referees.

JNO. B. GALE,
For Deft., Appellant.
ROBERT CHRISTIE,
For Plff., Respondent.

97. By the court—Boardman, J.

The findings of the referee Tabor are alleged to be without sufficient evidence to sustain them. Upon this assertion the defendant chiefly relies in this application for a reversal of the judgment and obtaining a new trial. A careful reading of all the evidence except defendant's establishes, with a fair degree of certainty, the following facts:

One Neer, in May, 1853, obtained letters-patent for a heater, and in July sold one-half to Morrison, the deed to Morrison being recorded in October, 1853. Soon after the date of such deed Morrison gave Neer a paper, by which Neer was authorized to make and sell the heaters and rights and have all the proceeds. (Fols. 147, 148.) This paper was lost and was never recorded. In October, 1854, Neer gave Stone, deceased defendant, a power of attorney to sell heaters and rights. (Fol. 309.) In July, 1855, Neer assigned all his interest in the patents to Isaiah Scott, plaintiff's intestate, and assignment was recorded in the same month, (fol. 61.) In August, 1856, Morrison deeded to Scott his, Morrison's, interest, (fol. 152,) but deed was never recorded. In July, 1855, Scott gave Neer a power of attorney to make and sell said heaters, and to sell rights, (fol. 324.) Neer's power of attorney to Stone of October, 1854, was revoked in July, 1856, revocation recorded October, 1856, (fol. 61,) but soon after it was renewed by Neer.

While Stone was such attorney for Neer, and after Scott became the owner of Neer's interest, Stone and others made several sales of territory and received therefor considerable property and sums of money. This action is brought to recover Scott's share of proceeds of such sales, and is founded upon the theory that Stone and Brown, original defendants, were jointly interested in making such sales and in the receipt of proceeds. To establish such theory the plaintiff's evidence is mostly

given. It appears that Brown and Stone were brothers-in-law,
98 occupying the same house and office, (fols. 73, 84, 250;) that Stone was insolvent, and by reason thereof unable to do business in his own name; that the power of attorney was given to Stone because it was more convenient for him, Brown, (fol. 72,) as Stone was his agent in other matters and traveled alone; that Brown took an active interest in the business of selling, assuring purchasers and subagents that Stone's authority was all right, and that he would sustain it, (fols. 201, 55, 71, 74, 145, 191;) that Brown received the proceeds of sales of rights from Stone and others, (fols. 192, 67, 69, 77,) directs sale of notes, (fol. 89,) part of proceeds of such sales; sanctions employment of Hubbard as subagent, (fols. 94, 96,) and gives him directions what to do as to heater; ships heaters to Hubbard, corresponds with him about the business, (fol. 104;) tries to settle with Hubbard for sales made, (fols. 79, 317,) and on failure sues Hubbard, claiming that Hubbard is his agent, and has him arrested; recovers and collects judgment of Hubbard, pays to Neer a portion of the proceeds of such recovery and retains the balance, (fols. 152, 141–2;) divides other proceeds with Neer and Stone.

In July, 1856, Stone, as attorney for Neer, deeds to Brown Neer's interest in said patent for the whole United States, except New England, and deed is recorded August, 1856, (fol. 114.) Hubbard introduces Brown "as his principal" to Lincoln, (fol. 49;) Brown assures Lincoln that Hubbard's negotiation for the sale of rights in Massachusetts was all right, and he, Brown, "would ratify all Hubbard did," (fol. 55;) Lincoln buys castings and patterns for heaters, (fol. 58;) "negotiation was partly with Brown and partly with Hubbard," (fols. 59, 337;) afterwards writes to Brown about same; Brown procures Neer to renew power of attorney to Stone, (fols. 145, 280,) upon guaranteeing Stone's use of power or Stone's accounting (fol. 191) properly for his sales, and Brown pays Neer, at different times, (fols. 142, 152, 154,) part of proceeds of sales made by Stone and others, knowing that Scott owns the patent, and that Neer is his attorney, (fols. 150, 170, 197, 215;) Brown does
99 not want Hubbard or Lincoln to see Neer while negotiations for a sale of right were going on, and gives a false reason, (fol. 74;) Brown and Hubbard differ as to the manner of making division of proceeds of sales, (fols. 89, 90.)

From this partial review of the evidence on the part of the plaintiff, it is evident that Scott was in fact the owner of the patent; that Neer was his attorney, having power to sell; that Stone was acting by authority of Neer and had the right to sell Scott's interests in the patent, though not the necessary authority to enable him to convey, and that Neer, Stone, and Brown were acting in concert to effect sales. The evidence is also sufficient to justify the conclusion, notwithstanding Brown's denials, that Brown and Stone were jointly interested in the commissions derived from such sales. As a consequence, the purchasers under such sales obtained a valid though not recordable title of Scott's interest in said patent, and Brown and Stone, having received the proceeds of such sales, are bound to account to Scott or his administrator for the same and pay over Scott's share thereof. If the evidence was less satisfactory that Stone conveyed or sold to the purchasers Scott's title, yet enough appears to show a ratification by Scott of any illegal act of Stone and Brown, and in any event a recovery in this action, or even the bringing of the action by Scott, constitutes a confirmation or ratification of their acts, and would estop Scott or his administrator from claiming that their sales were illegal. (1 Parson's Conts., 49, etc.) It is true that defendant Brown denies all the evidence upon which these conclusions are

based. But the weight of evidence and the credibility of witnesses was a matter to be judged of by the referee. It cannot be said he has erred. The various sources from which plaintiff's evidence is derived, its pointed character, the undoubted acts and admissions of Brown, the relations betwe'n Brown and Stone altogether make a mass of testimony that may well be entitled to credence in preference to the blank denials and explanations of Brown.

As no objection has been taken to the amount or character
100 of damages allowed by the referee, it is concluded that the facts found by the referee are justified by the evidence, and that this court can see no error therein.

The declarations of Stone to Dickerman (fol. 130) that Campbell and Hubbard were at work for him, and Brown, his principal, were made in connection with negotiations for a sale to Dickerman. If not admissible as res gestæ, nor as the declarations of one of two defendants jointly liable under the evidence as it there stood, were still admissible to show the agency of Stone and were immaterial in other respects. The essential inquiry related to the amount of proceeds of sales in Brown's hands, and whether Scott was entitled thereto. The precise relations between Stone and Brown were of no importance. The fact, if true, that Brown was principal and Stone his agent, would have prevented any claim of joint liability, and thus have defeated plaintiff's recovery. It is not apparent how defendant could have been injured by this evidence if improperly admitted.

Neer's testimony that he told Stone, "he (Neer) was acting under a power of attorney from Scott," (fol. 150,) was admissible to show knowledge in Stone of Scott's title. If the other evidence justified the conclusion that Stone and Brown were jointly interested in these patent sales, then the knowledge of Stone became the knowledge of Brown.

Consideration has thus been given to all the points suggested by the appellant without finding any adequate cause for interfering with the judgment rendered. While that judgment may be wrong and unjust, it is not apparent that any error has been committed which should lead to its reversal.

The judgment is therefore affirmed, with costs.

101 Court of appeals.

STATE OF NEW YORK, *ss:*

Pleas in the court of appeals held at the capitol, in the city of Albany, on the 19th day of January, in the year of our Lord one thousand eight hundred and seventy-five, before the judges of said court.

Witness the Hon. Sanford E. Church, chief judge, presiding.

E. O. PERRIN, *Clerk.*

FRANK S. ATWELL, ADMR., &C., RESPONDENT, *agst.* CHARLES K. BROWN, SURVIVOR, &C., APPELLANT. } Remittitur, Feb'y 18th, 1875.

Be it remembered that on the 6th day of October, in the year of our Lord one thousand eight hundred and seventy-four, Charles K. Brown, the appellant in this action, came here into the court of appeals, by
102 G. B. Kellogg, his attorney, and filed in the said court a notice of appeal and return thereto from the judgment of the general term

of the supreme court of the State of New York. And Frank S. Atwell, admr., &c., the respondent in said action, afterwards appeared in said court of appeals by A. K. Hadley, his attorney, which said notice of appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon the said court of appeals having heard this cause argued by Mr. Jno. B. Gale, of counsel for the appellant, and Mr. A. K. Hadley, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the general term of the supreme court, appealed from in this action, be in all things affirmed. And it was further ordered and adjudged that the respondent recover against the appellant costs of appeal to this court.

And it was also further ordered that the record aforesaid and
103 the proceedings in this court be remitted to the said supreme court, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be in all things affirmed with costs as aforesaid, and stand in full force, strength, and effect.

And hereupon, as well the notice of appeal and return thereto aforesaid, as the judgment of the court of appeals aforesaid, by them given in the premises, are by the said court of appeals remitted into the supreme court of the State of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said supreme court before the justices thereof, &c.

E. O. PERRIN,
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, Feb'y 18th, 1875.

104 I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

[SEAL.] E. O. PERRIN, *Clerk.*

(Remittitur stayed until after order of April 6th, 1875.)

105 *Opinion.*

Court of appeals.

FRANK S. ATWELL, ADMR., &C., RESPONDENT,
vs.
CHARLES K. BROWN, SURV'R, &C., APPELLANT.

J. B. GALE, *for Appt.*
A. K. HADLEY, *for Respt.*

FOLGER, J.:

Though the appellant, in his oral argument, dwelt upon but a few of the points in his printed brief, it was understood that he waived none of them. They will all be considered and passed upon.

The first is, that the testimony of Dickerman, that Stone, when effecting the last sale, said that he was acting for Brown, was improperly received in that it was evidence of hearsay.

The motion to strike out this testimony was made at the close of plaintiff's proofs.

Enough had then appeared in the testimony of Lincoln and Hubbard from which the referee could find a business connection between Brown and Stone in these matters, either as partners or otherwise. Enough had been testified to, to warrant the referee in finding that Brown was the principal and Stone his agent. This being so, these declarations of Stone were competent against Brown. They were part of res gestæ of the sale negotiated with Dickerman, and in answer to queries of the latter as to his authority to make the sale. Stone having been shown to be acting by authority of Brown, his declarations on the subject-matter were competent evidence.

106 The second point is, that evidence of Scott's knowledge of Stone's deeds, and participation in their proceeds, was erroneously admitted.

1st. It was permissible to prove by Scott, as well as by any other person, the fact of sales, and by whom made. The objection taken by the appellant, (at folios 162–3–4–5,) was based entirely upon the use to be made of the fact that Scott knew. This was proper to be urged at another stage of the case, when it should be in debate before the referee, what legal conclusion might properly be made from the fact; as circumstances in the case, the knowledge, &c., of Scott, were properly received in evidence. They are competent and material. To what legal conclusion they tended was for after discussion, and error in making an improper legal conclusion from them was for a different exception. Moreover, the testimony was proper to show that the sales were made with the knowledge of Scott, and with his assent, and thus to establish an estoppel upon him from interfering with the right, which the sales purported to transfer to the vendees in Massachusetts. This topic will be more considered further on.

The third point is, that the referee erred in finding erroneous facts, without evidence and against evidence; and the point specified wherein it is claimed that the referee so found, I have examined the testimony, with reference to the items. I think that it contains that from which the referee could find directly or by permissible inference, the substance and material part of that which is objected to.

The fourth point is, that when Stone, as Neer's attorney, made his deeds, the patent was owned, one-half by Morrison, and one-half by Scott; and Morrison had and yet retains an equal interest with plaintiff in the proceeds of such deeds.

Neer did give to Morrison a deed for one-half of the right; but Morrison thereafter, and before the deed or assignment to Scott, gave to Neer a written instrument, to the effect that Neer could go on

107 and manufacture and sell heaters and rights as though Morrison had no interest in the patent, and Neer was to have all the proceeds. Neer then assigned to Scott all of his interest in the patent, thus transferring to the latter all of the former one-half, and the right to use and sell the other half and to retain the proceeds. Whether by this permission or agreement given by Morrison to Neer, the latter and his assigns could make a good title for the whole of the patent-right to a vendee thereof, is not the question just here; but whether Scott got, by the paper from Morrison to Neer, and by that from Neer to him, the right to claim an account of the whole proceeds of a sale. The paper from Morrison is not in evidence in hæc verba. It may have been sufficient to authorize Neer to give a good deed for the whole. It is certain that it permitted him to sell and to retain the proceeds. Besides, before this action was commenced Morrison deeded to Scott. Thus all Morrison's interest and Neer's interest centered in Scott.

The fifth point is, that there was no actual relation between Brown and Neer as to the patent, or as to Stone's dealings under Neer's power of attorney to Stone.

I think that it is the clear preponderance of the testimony, that Brown was actually interested in the authority received by Stone from Neer to sell; that though the formal power of attorney was from Neer to Stone in terms, yet that in fact Brown was an agent of Neer for the sale, and the formal power was to Stone for the convenience of all; that Brown was jointly interested in the business and in the agent's share of the proceeds, and did in fact receive and retain much of them.

The sixth point is, that Brown's connection with Stone's sales did not render him liable to Neer, (or Scott,) for proceeds received by Neer's attorney, Stone. I think that the case shows an actual connection in the business of Brown with Neer, and that Brown was as much as, if not more than, Stone the actual agent of Neer in making the
108 sales, actually receiving the greater part of the proceeds thereof, and accountable for them to Neer, or his assigns.

The seventh point is, that when Neer revoked his first power to Stone any relation of Brown to Neer was sundered, and the receipt by Stone of proceeds of sales after that laid no responsibility upon Brown therefor to Neer. But though Neer did revoke the power of attorney to Stone, he renewed it again in terms as fully as it was at first. The renewal of the pre-existing relations of Neer & Stone, made at the request of Brown, was a renewal of the connection of Brown with Neer, as well as of Stone with Neer, and Brown, in fact, received a large part of the proceeds of the sale in virtue of his connection with and interest in the matter. It is impossible not to perceive from the case that Brown was the moving man in the enterprise, upon whom Neer relied, and who held a business relation in it to all the others engaged in carrying it on.

The eighth point is, that any supposable right of Scott to any proceeds of Stone's deeds was only against Neer, the principal therein.

This is based upon the proposition that the deeds are in legal effect from Neer, and that any liability of Brown or Stone was only to Neer as principal, and that Neer alone was liable to others. It has been held that the authorized acts of a known agent are the acts of his principal, and only the principal can be sued or sue thereon. (Colvin v. Holbrook, 2 N. Y., 126.) But is this rule able to include all the facts of this case? Is this an action against Brown & Stone, or either of them, as agents or agent of Neer? Is it not an action against them as in privity with Scott? The allegations of the complaint are meager, but they do not set up a claim against the defendants, as agents for Neer, or as acting for him. The averment is, that they "having made sales of the said patent while it was owned by Neer, continued to do so after the
109 transfer to the plaintiff." The facts of the case are, that Neer sold all of his interest in the right to Scott, who soon after gave back to Neer a power of attorney to sell; that after that sale there was a division of proceeds in which Neer, Stone & Brown assisted, and from which all received a portion; that of that sale Scott had knowledge and knew what was the character of the consideration received, of which he took a part; that Brown knew of Scott's interest in the subject-matter and his interest in these proceeds at the time of the division thereof; that Scott knew that Stone was negotiating the sale in Massachusetts, knew that it was contemplated and that it was made, and that Stone made it and never made any objections to the sales by Stone; that Stone knew before he completed the sale in Massachusetts, that Scott had a deed or assignment from Neer, and that Neer had a power of attorney from Scott

Enough had then appeared in the testimony of Lincoln and Hubbard from which the referee could find a business connection between Brown and Stone in these matters, either as partners or otherwise. Enough had been testified to, to warrant the referee in finding that Brown was the principal and Stone his agent. This being so, these declarations of Stone were competent against Brown. They were part of res gestæ of the sale negotiated with Dickerman, and in answer to queries of the latter as to his authority to make the sale. Stone having been shown to be acting by authority of Brown, his declarations on the subject-matter were competent evidence.

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The eighth point is, that any supposable right of Scott to any proceeds of Stone's deeds was only against Neer, the principal therein.

This is based upon the proposition that the deeds are in legal effect from Neer, and that any liability of Brown or Stone was only to Neer as principal, and that Neer alone was liable to others. It has been held that the authorized acts of a known agent are the acts of his principal, and only the principal can be sued or sue thereon. (Colvin v. Holbrook, 2 N. Y., 126.) But is this rule able to include all the facts of this case? Is this an action against Brown & Stone, or either of them, as agents or agent of Neer? Is it not an action against them as in privity with Scott? The allegations of the complaint are meager, but they do not set up a claim against the defendants, as agents for Neer, or as acting for him. The averment is, that they "having made sales of the said patent while it was owned by Neer, continued to do so after the
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to sell; Stone knew also, and asserted before the deed was given to the vendees in Massachusetts, that Neer had nothing to do with the right; Scott offered to give a deed to the vendees in New England if Brown & Stone would account for and pay over his share of the proceeds.

There results from these facts: That Brown & Stone knew that they were no longer dealing with the property of Neer, when they made the deeds to the vendees in Massachusetts, but that, on the contrary, they were dealing with and disposing of the property of Scott. Neer's information to Stone, that he, Neer, had sold to Scott, and that Scott had given back a power of attorney to him to sell, and his doubt expressed to Stone whether the latter could give a good title, was a sufficient intimation to Stone that his power to convey, as the attorney of Neer, was at an end, and that in whatever he did after that he was conveying property not Neer's but Scott's; and not as Neer's agent, but wrongfully, with no authority, and giving no good title, unless it was made valid by prior or subsequent action of Scott, and Stone's knowledge was Brown's knowledge from the relation between them.

110, 111 But this is not all. The conduct of Scott affected him and created relations between him and the vendees in Stone's deed which he could not afterwards change at his own volition. It cannot be doubted that if the subject of this sale and conveyance by Stone had been a piece of real property, to which Scott had the real legal title, and he had stood by and seen and known of the negotiation for a purchase of it by these vendees of Stone under like circumstances, and had known of the delivery of a conveyance and the payment of the purchase-money, and had kept silence, that he would have been estopped from ever after asserting his right and title thereto. (Brown vs. Bowen, 30 N. Y., 519.) That the property here dealt with is not real estate, cannot weaken the force or effect of the circumstances. The plaintiff was estopped from asserting his title to the patent-right, because, knowing of the intended purchase and agreement to buy, by Dickerman and others, and that deeds were about to be executed, and the price paid, he kept silence and did not interfere by declaring his right and putting the vendees on their guard. He did in fact assent to the sale. Assenting to the sale, and being estopped from recovering the property from the vendees, he has lost his right in it. (Smith vs. Sweeney, 35 N. Y., 291.) It is but one step further to state that Brown and Stone, cognizant of all the facts in the case, and bound to know the legal effect of the action of Neer, and of Scott, and of their own action, received the proceeds of the sale, subject to any equities which arose. They knew that though nominally selling as the agents of Neer, they were selling property which they had no right as such agents to deal with; that they had no interest in it of Neer to sell. It is urged that by the terms of the deed they only conveyed the interest of Neer, and that as he had no interest, nothing was conveyed, and Scott was left after the deed in as good plight as he was in before. But the vendees supposed that they were buying a real interest in the right, the right itself indeed, and Scott and all knew that they so understood, and all concerned meant that

112 the deed should transfer the right itself for the territory named in it. So that estoppel upon Scott is not limited to the rigid terms of the deed, but it is as broad as the purposes of the actors, of which he was cognizant and to which he assented. Brown and Stone are to be held to the same thing as Scott is held to, by the conjunction of their and his acts. Can it be that Scott, thus estopped to claim the patent-right, is not entitled to the proceeds of it? It cannot be that he must lose his property to the vendees and also the avails of it to the

defendants here, by acts to which the defendants and he were alike consenting. He may not sue them for a wrong in disposing of his property, for the very power to dispose of it beyond his reach came from his acquiescence in their act. Had he bee nignorant of the negotiation and sale until after they took place, he might have recognized these acts as performed for his benefit, by receiving the stipulated price as for property sold by him, and by retaining the money after notice of all the facts. (Cobb vs. Dows, 335.) Surely an acquieseence prior to the illegal act is as potent as one after it. In the case just cited two of the defendants were commission merchants; as such they had in charge property of the other two defendants, upon which as factors they had a lien for their commissions, &c. They made a sale of the property, but by mistake of a warehouseman delivered, instead of it, property of the plaintiffs, and received payment. It was held that the plaintiffs might recover the price not only of the principals, the consignors, but of the factors, the commission merchants, also, and that the latter had no defence in the fact that they had accounted to their principals, because the money was received on joint account and was divided among them all. So here, Scott may acquiesce in the sale of the patent-right; though made as property of Neer, he may elect to claim the avails of the sale, or his proportion thereof, and he may sue the defendants Brown and Stone therefor, who, though agents of Neer, were yet jointly interested in the proceeds of the sale, as the largest sharers therein. Nei-
113 ther is it true that to sustain the action for money had and received there must be express privity of contract. It lies against the finder of money lost, (Pierce vs. Craft, 12 J. R., 90,) and against any one who has money of another and has not a right conscientiously to retain it, (Calland v. Lloyd, 6 M. & W., 26,) and a privity of contract will be implied. The rule cited from Colvin v. Holbrook (supra) is to be taken with this other, that an agent who has received money for his principal to which the principal has no right, may be sued to recover it back. (Buller v. Harrison, Cowp., 565; Hearsey vs. Pruyn, 7 J. R., 179.)

The ninth point is, that Stone's deed did not necessarily affect Scott or his interest in the patent; and that Stone's sales were only in and by his deeds.

Limited to the terms of the proposition which it contains, this point is sound, but it leaves out of view all the surrounding facts and circumstances, amid which the deeds from Stone were given and which have been set forth and the legal results from which have been indicated in the consideration of the eighth point.

It is true that there was no express authority to Neer, in his power of attorney from Scott, to employ a subagent; but the fact of the sale to Scott, and of Scott's power of attorney back, were known to all parties engaged in the selling of the right before Stone had acted under his renewed power. The nature of the property to be sold, the course and practice of all these parties in relation to it, show that it was in their contemplation that Neer would or could continue to act through his former agents. Consent for an attorney to use a subagent in executing a power to dispose of property may be presumed, as well as expressly given, where the particular transaction and the attendant circumstances indicate that it was intended. The considerations presented above, treating of the eighth point, show that in the circumstances of the case the deeds of Stone did affect Scott and his interest, and that Stone's sales were not merely in and by his deeds.

114 The tenth, eleventh, and twelfth points are to the effect that the deeds of Stone, being in Neer's name, and for him and for his

interest, are not subjects of adoption or affirmance by Scott; that if they were they could be adopted only by deed, and that Scott did not assume to affirm them even by parol, and ignored any connection with them.

It is not necessary to sustain the plaintiff's judgment to find an affirmance or adoption by Scott of the acts of Stone, in the technical sense of the points now in hand. He did acquiesce in them, he being the true owner of the property, did stand by and knowingly suffer Stone and Neer and Brown to sell the same in the name of Neer as Neer's property, without objection. The sale was valid against him. His silence and concealment of his title were equivalent to an affirmation that he had no adverse title. Such is the rule in equity, and it is applicable here, though by the Federal laws certain formalities are required in the transfer of an interest in a patent-right.

The judgment appealed from should be affirmed with costs.

All concur.

(Returned with remittitur.)

115 In the court of appeals of the State of New York, at a term thereof, held at the capitol, in the city of Albany, on the 6th day of April, 1875, before the judges of said court.

Witness the Hon. Sanford E. Church, chief-justice, presiding.

FRANK S. ATWELL, ADMINISTRATOR, &C., OF Isaiah Scott, deceased, respondent,
against
CHARLES K. BROWN, SURVIVOR, &C., APPELLANT. } Order.

On motion of John B. Gale, of counsel for said appellant, & sufficient cause appearing therefor,

Ordered that the facts hereinafter stated be so stated, & form, with this order, a part of the record & proceedings of this court in this case, & that such facts are as follows:

On the argument of the appeal herein before this court, it was claimed by said appellant Brown that the act of Congress of the United
116 States, commonly called the patent act of 1836, & especially section 11 of said act, governed & determined the effect of the several transfers appearing in this case relative to the letters-patent issued to Neer, & determined the right in said patent of all concerned therewith; and that by said act & section 11, & the application thereof to the facts shown by the record herein, Scott, at the times of the sales & deeds for proceeds whereof judgment was recovered herein, owned only an undivided half of said patent, & Morrison owned the other half, & that Morrison owned & retained an equal interest with Scott in such proceeds; & that the decision herein that Scott was owner of said patent at the times of said sales & deeds, & his recovery herein as such owner, were therefore erroneous; and further it was claimed by said appellant that, under said patent-act, & section 11 thereof, said sales & deeds did not per se, or in connection with any facts shown by the record, affect Scott, or his interest in said patent, & that said recovery was therefore erro-
117 neous, and the decision of this court was against the said claims, & each thereof, thus made by said appellant; & for the particulars & grounds of such decision reference is hereby made to the opinion of this court per Justice Folger, which is hereby, for the purposes hereof, made a part of the said record.

Entered April 7, 1875.

Returned with remittitur.

118 At a special term of the supreme court, held at the court-house in the city of Troy, Rensselaer County, New York, on the 16 day of April, 1875.

Present, Hon. Charles R. Ingalls, justice.

FRANK S. ATWELL, ADMINISTRATOR, &C., OF Isaiah Scott, deceased, respondent,
agst.
CHARLES K. BROWN, SURVIVOR, &C., APPELLANT.

An appeal from the judgment entered in this action on the 27th day of May, 1874, having been taken to the court of appeals, and the record remitted from the court being filed, it is now, on motion of A. K. Hadley, esq., of counsel for plaintiff, respondent, adjudged that the said judgment be in all things affirmed, with costs as aforesaid, and stand in full force, strength, and effect, and that the plaintiff recover of the defendant, appellant, one hundred & twenty-one dollars and
119 sixty-one cents, costs of the said appeal.

C. R. INGALLS,
Jus. Sup. Court.

The foregoing is a transcript of the record & proceedings in the suit of Frank S. Atwell, administrator, &c., of Isaiah Scott, deceased, against Charles K. Brown, survivor, &c., & of the whole thereof.

Rensselaer County, clerk's office, September 27th, 1875.

E. C. REYNOLDS, *Clerk.*

120 STATE OF NEW YORK,
County of Rensselaer, Clerk's Office, ss:

I, Eben C. Reynolds, clerk of the county of Rensselaer and clerk of the supreme court of the State of New York in and for the third department, by virtue of the annexed writ of error, and in obedience thereto, do hereby certify that I have compared the annexed transcript of the record and proceedings had in the case of Charles K. Brown, survivor, &c., plaintiff in error, against Frank S. Atwell, administrator, &c., of Isaiah Scott, deceased, defendant in error, with the original thereof filed in this office, and that the same is a correct transcript therefrom and of the whole of said original.

And I, the said clerk, do herewith return to the justices of the
121 Supreme Court of the United States the said transcript & the said writ of error; and also an assignment of errors, & a prayer for reversal, with a citation to the defendant in error, filed in my office by the plaintiff in error, to be returned by me as aforesaid.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of Troy, in the northern district of New York, this 27th day of September, 1875.

[SEAL.] E. C. REYNOLDS, *Clerk.*

122 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the supreme court of the State of New York, greeting:

Because in the record & proceedings, as also in the rendition of the judgment of a plea & in a suit which is in the said court before you, or some of you, having thereto been remitted by the court of appeals of

the State of New York, after decision & judgment rendered in said court of appeals by the judges thereof, being the highest court of law or equity of said State in which a decision could be had in the said suit, between Frank S. Atwell, administrator, &c., of Isaiah Scott, deceased, plaintiff, and Charles K. Brown, survivor, &c., defendant, wherein was drawn in question the construction of a statute of the United States, & a title, right, privilege, or immunity was specially claimed by said defendant under such statute, & the decision was against the title, right, privilege or immunity specially set up or claimed by said defendant under such statute, a manifest error hath happened, to the great damage of said Charles K. Brown, survivor, &c., as by his complaint appears.

123 We being willing that such error, if any there has been, should be duly corrected, & full & speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly & openly, you send the record & proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that the record & proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right & according to the law & custom of the United States ought to be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this 10th day of April, in the year of our Lord one thousand eight hundred & seventy-five, & of the Independence of the United States the ninety-ninth.

[SEAL.] CHARLES MASON,
Clerk of the Circuit Court of the United States for the Northern District of New York.

The above writ of error allowed this 21st day of April, 1875.

S. E. CHURCH,
Ch. J. Court of Appeals.

GALE & ALDEN,
Attorneys for Plaintiffs in Error, Troy, N. Y.

(Indorsed :) Supreme Court of the United States. Charles K. Brown, survivor, &c., plaintiff in error, vs. Frank S. Atwell, administrator, &c., of Isaiah Scott, deceased, defendant in error. Writ of error. Gale & Alden, attys. for plff. in error, Troy, N. Y. Filed April 23, 1875.

124 *Assignment of errors & prayer for reversal.*

Supreme Court of the United States.

CHARLES K. BROWN, SURVIVOR, &C., PLAINTIFF in error,
vs.
FRANK S. ATWELL, ADMINISTRATOR, &C., OF Isaiah Scott, deceased, defendant in error.

Of October term, in the year of our Lord one thousand eight hundred and seventy-five.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Charles K. Brown,

survivor, &c., by Gale & Alden, his attorneys, & says that in the record & proceedings aforesaid there is manifest error in this, to wit:

First. That in the said suit the construction of the statute of the United States, being the act of Congress entitled "An act to promote the progress of useful arts & to repeal all acts & parts of acts heretofore made for that purpose," approved July 4, 1836, & commonly called
125 the patent act of 1836, & especially of section 11 of said act, which is substantially in these words, "And be it further enacted, that every patent shall be assignable in law, either as to the whole interest or any undivided part; which assignment & also every grant & conveyance of the exclusive right under any patent to make & use & to grant to others to make & use the thing patented within & throughout any specified part or portion of the United States shall be recorded in the Patent-Office within three months from the execution thereof, for which the assignee or grantee shall pay to the Commissioner the sum of three dollars," was drawn in question, & a title, right, privilege, or immunity was claimed by said plaintiff in error under said statute, & the decision of the said court of appeals, being the highest court of law or equity in the State of New York, in which a decision could be had in the said suit, was against the title, right, privilege, or immunity especially set up & claimed by said plaintiff in error under the said statute in this, to wit:

126 1. That said plaintiff in error specially claimed, under said statute, that the same determined the effect of the various sales (appearing in & by said record) of Neer's said patent & of rights under said patent;

Whereas the said decision was against the right & immunity so claimed & wholly disregarded & contravened said statute.

2. That said plaintiff in error specially claimed under said statute, that said Scott's title to said patent at the times of Stone's said sales was only to an undivided half of said patent;

Whereas said decision was against the right & immunity so claimed, & was that said Scott was at such times the owner of said patent.

3. That said plaintiff in error specially claimed under said statute that Morrison having acquired under the deed thereof to him by Neer, dated July 18, 1853, & recorded in the Patent-Office October 3d, 1853, an undivided half of Neer's said patent, continued to own such undivided half at the times of the four sales by Stone, referred to in Referee Tabor's report, notwithstanding the writing which Morrison executed to Neer, to the effect that Neer could manufacture & sell heaters
127 & rights, & have the proceeds therefrom as if Morrison had no interest in the patent, & notwithstanding also Neer's assignment to Scott, dated July 20th, 1855, of Neer's interest in said patent;

Whereas said decision was against the right & immunity so claimed, & was that said writing revested Neer with the half so conveyed to Morrison, & so that the entire patent passed to Scott under & by Neer's said assignment to him.

4. That said plaintiff in error specially claimed under said statute that said writing from Morrison to Neer only exempted Neer from accountability to Morrison for Neer's use of said patent & for the proceeds of licenses he should grant to others for using same, but did not convey to Neer any interest in the patent itself;

Whereas said decision was against the right & immunity so claimed, & was, that because of such writing Neer's deed of July 20, 1855, to Scott became a deed of the entire patent, including the half interest therein which Neer had conveyed to Morrison.

the State of New York, after decision & judgment rendered in said court of appeals by the judges thereof, being the highest court of law or equity of said State in which a decision could be had in the said suit, between Frank S. Atwell, administrator, &c., of Isaiah Scott, deceased, plaintiff, and Charles K. Brown, survivor, &c., defendant, wherein was drawn in question the construction of a statute of the United States, & a title, right, privilege, or immunity was specially claimed by said defendant under such statute, & the decision was against the title, right, privilege or immunity specially set up or claimed by said defendant under such statute, a manifest error hath happened, to the great damage of said Charles K. Brown, survivor, &c., as by his complaint appears.

We being willing that such error, if any there has been, should
123 be duly corrected, & full & speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly & openly, you send the record & proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that the record & proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right & according to the law & custom of the United States ought to be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this 10th day of April, in the year of our Lord one thousand eight hundred & seventy-five, & of the Independence of the United States the ninety-ninth.

[SEAL.] CHARLES MASON,
Clerk of the Circuit Court of the United States for the Northern District of New York.

The above writ of error allowed this 21st day of April, 1875.

S. E. CHURCH,
Ch. J. Court of Appeals.

GALE & ALDEN,
Attorneys for Plaintiffs in Error, Troy, N. Y.

(Indorsed :) Supreme Court of the United States. Charles K. Brown, survivor, &c., plaintiff in error, vs. Frank S. Atwell, administrator, &c., of Isaiah Scott, deceased, defendant in error. Writ of error. Gale & Alden, attys. for plff. in error, Troy, N. Y. Filed April 23, 1875.

124 *Assignment of errors & prayer for reversal.*

Supreme Court of the United States.

CHARLES K. BROWN, SURVIVOR, &C., PLAINTIFF IN ERROR,
vs.
FRANK S. ATWELL, ADMINISTRATOR, &C., OF ISAIAH SCOTT, DECEASED, DEFENDANT IN ERROR.

Of October term, in the year of our Lord one thousand eight hundred and seventy-five.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Charles K. Brown,

survivor, &c., by Gale & Alden, his attorneys, & says that in the record & proceedings aforesaid there is manifest error in this, to wit:

First. That in the said suit the construction of the statute of the United States, being the act of Congress entitled "An act to promote the progress of useful arts & to repeal all acts & parts of acts heretofore made for that purpose," approved July 4, 1836, & commonly called
125 the patent act of 1836, & especially of section 11 of said act, which is substantially in these words, "And be it further enacted, that every patent shall be assignable in law, either as to the whole interest or any undivided part; which assignment & also every grant & conveyance of the exclusive right under any patent to make & use & to grant to others to make & use the thing patented within & throughout any specified part or portion of the United States shall be recorded in the Patent-Office within three months from the execution thereof, for which the assignee or grantee shall pay to the Commissioner the sum of three dollars," was drawn in question, & a title, right, privilege, or immunity was claimed by said plaintiff in error under said statute, & the decision of the said court of appeals, being the highest court of law or equity in the State of New York, in which a decision could be had in the said suit, was against the title, right, privilege, or immunity especially set up & claimed by said plaintiff in error under the said statute in this, to wit:

126 1. That said plaintiff in error specially claimed, under said statute, that the same determined the effect of the various sales (appearing in & by said record) of Neer's said patent & of rights under said patent;

Whereas the said decision was against the right & immunity so claimed & wholly disregarded & contravened said statute.

2. That said plaintiff in error specially claimed under said statute, that said Scott's title to said patent at the times of Stone's said sales was only to an undivided half of said patent;

Whereas said decision was against the right & immunity so claimed, & was that said Scott was at such times the owner of said patent.

3. That said plaintiff in error specially claimed under said statute that Morrison having acquired under the deed thereof to him by Neer, dated July 18, 1853, & recorded in the Patent-Office October 3d, 1853, an undivided half of Neer's said patent, continued to own such undivided half at the times of the four sales by Stone, referred to in Referee Tabor's report, notwithstanding the writing which Morrison executed to Neer, to the effect that Neer could manufacture & sell heaters
127 & rights, & have the proceeds therefrom as if Morrison had no interest in the patent, & notwithstanding also Neer's assignment to Scott, dated July 20th, 1855, of Neer's interest in said patent;

Whereas said decision was against the right & immunity so claimed, & was that said writing revested Neer with the half so conveyed to Morrison, & so that the entire patent passed to Scott under & by Neer's said assignment to him.

4. That said plaintiff in error specially claimed under said statute that said writing from Morrison to Neer only exempted Neer from accountability to Morrison for Neer's use of said patent & for the proceeds of licenses he should grant to others for using same, but did not convey to Neer any interest in the patent itself;

Whereas said decision was against the right & immunity so claimed, & was, that because of such writing Neer's deed of July 20, 1855, to Scott became a deed of the entire patent, including the half interest therein which Neer had conveyed to Morrison.

128 5. That said plaintiff in error specially claimed under said statute that Morrison's deed to Scott, made after Stone's said sales, only conveyed Morrison's then remaining interest in said patent; & further, that if Stone's last two sales had been effectual, as such decision maintained, to convey the patent right in the New England States, then that such deed only conveyed Morrison's interest in said patent in the other territory; & further, that any interest in proceeds of Stone's said sales which was by such deed conveyed to Scott, equally passed, together with Scott's previous interest in such proceeds, to Hubbard & Pitman under Scott's like deed to them:

Whereas said decision was against the right & immunity so claimed, and to the effect that any previous defect in Scott's title was supplied by such deed from Morrison to him.

6. That said plaintiff in error specially claimed under said statute that Scott was shown to have owned only an undivided half of said patent at the times of Stone's said sales, and could only recover accordingly;

Whereas said decision was against the right & immunity so
129 claimed, & was that Scott was entire owner of said patent at such times, & could recover accordingly.

7. That said plaintiff in error specially claimed under said statute that Stone's said sales & his deeds (being only as attorney for Neer & in his name & of his interest) conveyed only Neer's interest in said patent, & did not convey any interest which Scott then had therein;

Whereas said decision was against the right & immunity so claimed, & wholly ignored said statute & its true construction & governing force, & was that such sales & deeds conveyed Scott's interest in said patent within the territories which said sales related to & vested good title thereto in the purchasers.

8. That said plaintiff in error specially claimed under said statute that Stone's last two sales & deeds did not per se, nor in connection with any facts shown by the record herein, convey or affect any right or interest of Scott in said patent;

Whereas said decision was against the right & immunity so claimed,
& was that the purchasers in said sales acquired good title to
130 said patent within the territories which said sales related to.

Second. That in the record & proceedings aforesaid there is also manifest error in this, to wit, that under & by said statute & its true construction, as specially claimed by said plaintiff in error, the judgment aforesaid ought to have been given for said plaintiff in error against said defendant in error;

Whereas the same was given for said defendant in error against said plaintiff in error.

And said plaintiff in error prays that the judgment aforesaid may be reversed, annulled, & altogether held for nothing, & that said plaintiff in error may be restored to all things he hath lost by the said judgment, &c.

GALE & ALDEN,
Attorneys for Plaintiff in Error.
JNO. B. GALE,
Of Counsel.

(Indorsed:) Supreme Court of the United States. Charles K. Brown, survivor, plaintiff in error, vs. Frank S. Atwell, admr., &c., defendant in error. Assignment of errors, & prayer for reversal. Gale & Alden, attys. for plff. in error. Jno. B. Gale, counsel for plff. in error. Filed Sept. 27th, 1875.

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6. That said plaintiff in error specially claimed under said statute that Scott was shown to have owned only an undivided half of said patent at the times of Stone's said sales, and could only recover accordingly;

Whereas said decision was against the right & immunity so
129 claimed, & was that Scott was entire owner of said patent at such times, & could recover accordingly.

7. That said plaintiff in error specially claimed under said statute that Stone's said sales & his deeds (being only as attorney for Neer & in his name & of his interest) conveyed only Neer's interest in said patent, & did not convey any interest which Scott then had therein;

Whereas said decision was against the right & immunity so claimed, & wholly ignored said statute & its true construction & governing force, & was that such sales & deeds conveyed Scott's interest in said patent within the territories which said sales related to & vested good title thereto in the purchasers.

8. That said plaintiff in error specially claimed under said statute that Stone's last two sales & deeds did not per se, nor in connection with any facts shown by the record herein, convey or affect any right or interest of Scott in said patent;

Whereas said decision was against the right & immunity so claimed,
& was that the purchasers in said sales acquired good title to
130 said patent within the territories which said sales related to.

Second. That in the record & proceedings aforesaid there is also manifest error in this, to wit, that under & by said statute & its true construction, as specially claimed by said plaintiff in error, the judgment aforesaid ought to have been given for said plaintiff in error against said defendant in error;

Whereas the same was given for said defendant in error against said plaintiff in error.

And said plaintiff in error prays that the judgment aforesaid may be reversed, annulled, & altogether held for nothing, & that said plaintiff in error may be restored to all things he hath lost by the said judgment, &c.

GALE & ALDEN,
Attorneys for Plaintiff in Error.
JNO. B. GALE,
Of Counsel.

(Indorsed:) Supreme Court of the United States. Charles K. Brown, survivor, plaintiff in error, vs. Frank S. Atwell, admr., &c., defendant in error. Assignment of errors, & prayer for reversal. Gale & Alden, attys. for plff. in error. Jno. B. Gale, counsel for plff. in error. Filed Sept. 27th, 1875.

131 Supreme Court of the United States.

CHARLES K. BROWN, SURVIVOR, &C., PLAINTIFF in error,
vs.
FRANK S. ATWELL, ADMINISTRATOR, &C., OF Isaiah Scott, deceased, defendant in error.
} Prayer for reversal.

Of October term, in the year of our Lord one thousand eight hundred and seventy-five.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Charles K. Brown, survivor, &c., by Gale & Alden, his attorneys, & says that he has duly filed with the record herein an assignment of errors & therein prayed for a reversal of the judgment herein brought up for review by the writ of error herein, but for greater certainty said plaintiff in error now separately prays that the judgment aforesaid may be reversed, annulled, & altogether held for nothing, & that said plaintiff in error
132 may be restored to all things he hath lost by the said judgment, &c.

GALE & ALDEN,
Attorneys for Plaintiff in Error.
JNO. B. GALE,
Of Counsel.

(Indorsed:) Supreme Court of the United States. Charles K. Brown, survivor, &c., plaintiff in error, vs. Frank S. Atwell, admr., &c., defendant in error. Prayer for reversal. Gale & Alden, attys. for plff. in error. Jno. B. Gale, counsel for plff. in error, Troy, N. Y. Filed Sept. 27, 1875.

133 The United States of America to Frank S. Atwell, administrator, &c., of Isaiah Scott, deceased, greeting:

You are hereby cited & admonished to be & appear at a Supreme Court of the United States to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the county of Rensselaer, in the State of New York, wherein Charles K. Brown, survivor, &c., is plaintiff in error, & you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, & why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Sanford E. Church, chief judge of the court of appeals, this 21st day of April, in the year of our Lord one thousand eight hundred & seventy-five.

S. E. CHURCH,
Ch. J. Court of Appeals.

GALE & ALDEN,
Attorneys for Plaintiff in Error, Troy, N. Y.

(Indorsed:) Supreme Court of the United States. Charles K. Brown, survivor, &c., plaintiff in error, vs. Frank S. Atwell, administrator, &c., of Isaiah Scott, deceased, defendant in error. Citation. Gale & Alden, attys. for plff. in error, Troy, N. Y. Jno. B. Gale, counsel for plff. in error. Filed Sept. 27, 1875.

131 Supreme Court of the United States.

CHARLES K. BROWN, SURVIVOR, &C., PLAINTIFF in error,
vs.
FRANK S. ATWELL, ADMINISTRATOR, &C., OF Isaiah Scott, deceased, defendant in error.
} Prayer for reversal.

Of October term, in the year of our Lord one thousand eight hundred and seventy-five.

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132 may be restored to all things he hath lost by the said judgment, &c.

GALE & ALDEN,
Attorneys for Plaintiff in Error.
JNO. B. GALE,
Of Counsel.

(Indorsed:) Supreme Court of the United States. Charles K. Brown, survivor, &c., plaintiff in error, vs. Frank S. Atwell, admr., &c., defendant in error. Prayer for reversal. Gale & Alden, attys. for plff. in error. Jno. B. Gale, counsel for plff. in error, Troy, N. Y. Filed Sept. 27, 1875.

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Witness the Hon. Sanford E. Church, chief judge of the court of appeals, this 21st day of April, in the year of our Lord one thousand eight hundred & seventy-five.

S. E. CHURCH,
Ch. J. Court of Appeals.

GALE & ALDEN,
Attorneys for Plaintiff in Error, Troy, N. Y.

(Indorsed:) Supreme Court of the United States. Charles K. Brown, survivor, &c., plaintiff in error, vs. Frank S. Atwell, administrator, &c., of Isaiah Scott, deceased, defendant in error. Citation. Gale & Alden, attys. for plff. in error, Troy, N. Y. Jno. B. Gale, counsel for plff. in error. Filed Sept. 27, 1875.

134 The United States of America to Frank S. Atwell, administrator, &c., of Isaiah Scott, deceased, greeting:

You are hereby cited & admonished to be & appear at a Supreme Court of the United States to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the county of Rensselaer, in the State of New York, wherein Charles K. Brown, survivor, &c., is plaintiff in error, & you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, & why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Sanford E. Church, chief judge of the court of appeals, this 21st day of April, in the year of our Lord one thousand eight hundred & seventy-five.

S. E. CHURCH,
Ch. J. Court of Appeals.

GALE & ALDEN,
Attorneys for Plaintiff in Error, Troy, N. Y.

135 STATE OF NEW YORK,
Rensselaer County, ss:

John B. Gale of Troy, in said county, being sworn, says that he knows A. K. Hadley, esq., & that he was the attorney for Frank S. Atwell, administrator in the suit named in within citation, & that deponent knows his handwriting, & that his signature to the admission below is, as deponent believes, genuine, & that within copy citation & such admission were received by deponent from said Hadley by mail about May 1, 1875. Deponent further says that a copy of the writ of error within mentioned was, on April 23d, 1875, lodged in Rensselaer County clerk's office for the defendant in error.

JNO. B. GALE.

Sworn before me this 2d day of October, 1875.

C. L. ALDEN,
Notary Public, Troy, N. Y.

(Indorsed:) Supreme Court of the United States. Charles K. Brown, survivor, &c., plaintiff in error, vs. Frank S. Atwell, administrator, &c., of Isaiah Scott, deceased, defendant in error. Copy citation. Gale & Alden, attys. for plff. in error, Troy, N. Y.

Personal service of a citation, of which within is a copy, is hereby admitted this 27 day of April, 1875.

A. K. HADLEY,
Attorney for Defts. in Error.

Sup. Court U. S. 1875, Octo. term. No. 622. Brown, &c., vs. Atwell, admr. Citation. Filed 4 October, 1875.

(Indorsement on cover:) No. 622. Charles K. Brown, survivor, &c., plaintiff in error, vs. Frank S. Atwell, admr., &c., of Isaiah Scott, decd. Remittitur. New York sup. court. Filed 30th September, 1875.

JAMES F. JEROME, Printer, 92 White Street, N. Y.

Supreme Court

OF THE UNITED STATES.

CHARLES K. BROWN, Survivor, &c.,
Plaintiff in Error,
vs.
FRANK S. ATWELL, Administrator, &c. of Isaiah Scott, Deceased.
Defendant in Error.

Brief of Defendant in Error for Motion.

STATEMENT OF FACTS.

On the 31st day of May, 1853, Letters Patent were granted to Charles Neer, for an Air Heater and Grate, (page 3.)

On the 18th of July, 1853, said Neer sold and conveyed an undivided half of the patent to James Morrison; and Morrison then, within a few days thereafter, gave to Neer an agreement in writing authorizing

Neer to sell the Heater and Grate, and rights, the same as if no sale had been made to him ; and giving to Neer all the proceeds, (page 4.)

After that, on the 23d of October, 1854, said Neer gave to Samuel S. Stone, a power of attorney to sell territorial rights, to make and use the patent, (page 3.)

Brown, the plaintiff in error, was then, and continued afterwards to be associated in business with said Stone, who, in acting under this power of attorney, and in selling the rights, acted for, or as agent for Brown, (pages 3, 51, 54.)

After that, on the 20 of July, 1855, Neer sold and conveyed all his interest in the patent to Isaiah Scott, (page 4.)

Then, on the 23d of July, 1855, Scott gave to Neer a power of attorney, to sell and dispose of rights under the patent, (page 4.)

In the autumn of 1855, and on the 6th of March, and on the 16th of June, 1856, Stone made sales of rights under the patent, acting under his power of attorney, (page 3,) knowing at the time that Scott was the owner; and Scott also knew of the sales being made, and made no objections thereto, (pages 4, 56.)

On the 30th of June, 1856, Neer revoked his power of attorney to Stone; but in a few days afterward, (July, 3d, 1856) renewed it again, (page 3.)

On the 28th of August, 1856, before this suit was commenced, Morrison conveyed all of his interest in the patent to Scott, by which he became sole owner of all the interest of Neer and Morrison, (page 4.)

For sales made after the assignment to Scott, Brown and Stone received certain proceeds which they refused to account for, and refused to pay over

any portion of the same to Scott; and to recover that, Scott brought this action against them, (page 1, 2.) Pending the action, Stone died, and the action was continued against Brown, as survivor, (page 2.)

The cause was tried before a referee, who decided in favor of the plaintiff (Scott,) holding that Brown, as such survivor was liable to account for the moneys received by him and Stone, as the proceeds of four sales made by them; and that the plaintiff was entitled to judgment for one-fourth of the proceeds of two of said sales; and for one-half of the proceeds of the two others. (See Referees Report, pages 3, 4.)

From the judgment entered on that report, the defendant Brown, appealed to the General Term of the Supreme Court, (page 48,) where the judgment was affirmed, (page 49,) and from that judgment of affirmance, he then appealed to the Court of Appeals of the State of New York, (page 49,) where the judgment was again affirmed, (pages 52, 53, 59.)

He then applied for a writ of error to remove the cause to the Supreme Court of the United States, which was allowed, and the record is thus brought here for review, (pages 59, 60.)

He assigns for error, and claims that Section 11 of the act of Congress, entitled "An Act to promote the progress of Useful Arts, and to repeal all acts and parts of acts heretofore made for that purpose," approved July 4th, 1836, commonly called the Patent Act of 1836, was drawn in question, and that a right, title, privilege or immunity was claimed by the plaintiff in error under that statute; and that the decision was against the title, right privilege or immunity set up and claimed by the plaintiff in error, (page 61.)

That section of the Patent Act relates only to the assignment of patents, and as the foregoing statement

of facts, and a reference to the pleadings and proceedings in the cause will show, there was no such question, nor the construction of any statute involved in the case; and the plaintiff (the defendant in error) now moves to dismiss the writ of error for want of jurisdiction; and for the reasons stated in the following points, the motion should be granted.

POINTS.

I

Neither on the trial of the cause, nor or the appeal was Section 11 of said Act of Congress construed, or even called in question; nor was there any question calling for the construction of that, or any other section of the Patent Act.

Of course, if such a question was raised, or necessarily presented and decided, the pleadings, the referees report, the judgment, or the opinion of the Court below would show it. It could not otherwise appear.

The plaintiff, in his complaint claims that Neer was the owner of the patent, and assigned it to the plaintiff; and that the defendants after that made sales of the patent, and refused to account for, or pay over the proceeds to the plaintiff.

The defendants, by their answer simply denied each and every allegation of the complaint, (page 2.) The referee found from the evidence, and decided that Neer owned the patent; that he gave to the defendant Stone, a power of attorney to sell rights; that Stone was acting for, or as agent for the defendant, Brown, that as between them (Stone and Brown)

the power of attorney was so taken in "Stone's name as a convenient way of doing the business, as Stone was to do the travelling;" that Neer then sold to Morrison an undivided half of the patent, Morrison giving back to Neer full authority to make and sell the Heater, Grate, and rights, and to have the proceeds of the sales the same as if no sale had been made to him; that afterwards, in July, 1855, Neer sold and conveyed the whole of the patent to the plaintiff, Scott, and after that the defendants (Stone and Brown) knowing of Scott,s ownership, made the sales and received the proceeds in question, (pages 3, 4, 5.)

Certainly, there is nothing so far, requiring a construction of the statute providing for the assignment and the recording of the assignments of patents; nor was it construed, considered or passed upon. And such being the facts, there can be no doubt about the plaintiff's, (Scott's,) right to recover. But to make his right to recover if possible, still clearer the referee also finds that Morrison, before the commencement of this action, assigned all his interest to Scott. This was not necessary. He had it all before, Morrison having authorized Neer to sell, the same as if no assignment had ever been made to him. But the conveyance from Morrison to Scott could do no harm, and was made from their over-abundant caution.

So far, no question did, or could arise under the statute, or calling for a construction of the statute in question; and a reference to the opinion of the court will show that no such question arose, or was presented, or considered on the appeal.

It is essential to the jurisdiction of this Court, over the judgment or decree of a State Court, that it shall appear that one of the questions mentioned in the Staute must have been raised and presented to the State

Court; that it must have been decided by the State Court against the right claimed or asserted by the plaintiff in error, under the constitution, laws, or authority of the United States; or, that such a decision was necessary to the judgment or decree rendered in the cause.

Murdock vs City of Memphis, 20 Wallace 590.

Was there any such question raised and presented in the State Court, or was any such question decided, or *was such a decision necessary in this case?* A bare statement of the case, or inspection of the record will show that there was not.

II.

But the counsel for the plaintiff in error claims, as appears by an order which he has procured to be inserted in the record since the hearing and decision of the cause in the State Court (see page 58), that he claimed *in his argument* before the Court of Appeals, of the State of New York, that the Act of Congres called the "Patent Act," and especially Section 11 of that act, governed the effect of the sales, &c., and that the decision of the Court was against the claims so made by him; for the particulars of which he refers to the opinion of the Court.

The questions necessary to give this Court jurisdiction to review the decision on a writ of error were not, nor could they be raised or presented in that way.

1. Whether the questions were raised and decided or not must appear from the pleadings, the referee's report, or the judgment.

It is not sufficient that the counsel argued such questions. The questions must have been necessary

to the decision of the cause, and actually considered and decided by the Court.

Parmelee *vs.* Lawrence, 11 Wallace, 36.
Wortley *vs.* The Commissioners, 9 Wallace, 611.
The Victory, 6 Wallace, 382.

If such questions could be raised and jurisdiction given to this court by the mere argument of counsel, any and all causes could be removed to this court for review, as counsel could present and argue such questions in every case, whether necessary to the decision of the cause or not.

2. And if the question cannot be so raised, the recital in an *ex parte* order, or in a certificate of the court that the counsel did so argue the question, can be of no use.

That is all that this order amounts to.

Nor would a certificate in any case be sufficient alone, to show that the questions necessary to give this court jurisdiction were raised and decided.

Parmelee *vs.* Lawrence, 11 Wallace, 36.
Railroad Co. *vs.* Rock, 4 Wallace, 177.
Lawler *vs.* Walker, 14 How., 149.

3. Even if a question under the United States statute sufficient to give this court jurisdiction might have been raised, or ought to have been raised and decided, yet if it was not both *raised* and decided, this court has not jurisdiction.

The Victory, 6 Wallace, 382.
Hamilton Company *vs.* Massachusetts, 6 Wallace, 632.

4. Nor will it help the plaintiff, in error if such question was actually raised and decided, if it was not so *necessarily* decided, or if such decision was not necessary to the decision of the cause.

Mills *et al vs.* Brown, 16 Peters, 525.
Murdock *vs.* City of Memphis, 20 Wallace, 590.

And as before shown no such question was before the Court, nor was the decision of any such question necessary in the cause.

5. Nor is it true that the opinion of Justice Folger shows that any question arising, under the Patent Act, was even considered by the Court of Appeals. In that opinion, (see pages 53, 54, 55, 56, 57, and 58) no allusion is made to the Patent Act, nor does it anywhere appear from that opinion that any such question was presented, argued, considered or decided.

Assuming, therefore, since the decision of Murdock *vs.* the City of Menphis, before cited, that this Court may look into the properly certified opinion of the State Court to ascertain what questions were considered in that Court, yet this Court will look in vain in the opinion of the Court of Appeals, in this cause, for any evidence that any section of the Patent Act, or any right, privilege or immunity claimed under it, was presented, considered or decided by that Court, or necessary to be decided.

6. Besides, if such question had *there* been raised and decided, it would not give this Court jurisdiction. Such questions cannot first be raised in the Appellate Court. They must be first raised on the *trial of the cause*, in the Court below.

Parmelee *vs.* Lawrence, 11 Wallace, 36.

The order inserted in the record cannot, for these various reasons, aid the plaintiff in error.

III.

A reference to the assignment of errors will still more clearly show the position or claim of the coun-

sel for the plaintiff in error to be untenable. In his first specification, he alleges that he specially claimed under said statute, that the same determined the effect of the various sales of Neer's patent, and of rights under said patent: and that the decision was against such claim (page 61). *That* is too indefinite to mean anything. But searching for a meaning, *when*, *where*, or *how* was it claimed that the Statute determined the effect of said sales? Neither the record nor the opinion of the court show it.

What does the plaintiff in error mean by the *effect* of the sales?

The contracts of sale were between Stone and the purchaser; the *effect* was to pass the title of the thing sold to the purchaser. Whether or not Stone had a right to make the sale is not material, as no one could complain but the plaintiff (Scott), and he acquiesced. Stone and his principal, or partner Brown, received the purchase money. If Stone and Brown were wrong doers in selling, Scott, the owner, was entitled to all the proceeds.

Newman *vs.* the Supervisors of Livingston, 45, N. Y., 676.

Schroeppel *vs.* Corning, 5, N. Y., Rep., 107, 112.

Young *vs.* Marshall, 8 Bingham, 43.

If, however, he recognized Stone as acting for him, as it seems he did, he is certainly entitled to the proceeds after deducting the defendant's commissions, or compensation, and that is all he recovered or claimed in the action. (Pages, 56 and 57.)

How the section of the statute providing for, or authorizing the assignment, or recording of the assignments of patents, can come in question, or require a construction in *such* a case, passes ordinary com-

prehension. That a patent can be assigned, is not disputed; that that statute authorizes such an assignment, is not disputed; the Court was not called upon to decide that question, either way; that the patent was assigned to Scott, that the sales were made by Stone, and that Stone and Brown received the money, is not disputed; whether the assignment was, or whether any of the assignments were recorded, or not, is of no consequence in this case, nor was that question presented, or necessary to the decisions in the State Court. Title passes by the assignment—not by the recording of it. The provision in that act for recording assignments is merely directory.

Act of 1836, Ch., 357, sec. 11.
Blanch Gun Stock Co. *vs.* Warner, 1 Blatchford, 271.
Brooks *vs* Bryan, 2 Story, 525, 542.
Pitts *vs* Whitman, 2 Story, 609, 615.
Hall *vs.* Speer, 1st Pittsburgh, Pa., 513.
Boyd *vs.* McAlpen, 3 McLean, 427.
Case *vs.* Redfield, 4 McLean, 526.

No recording act—not even the present statute—(see Sec. 36) would make an assignment of a patent void, if not recorded. It only makes them void "as against any *subsequent purchaser or mortgagee* for a valuable consideration without notice."

As Stone and Brown were neither *purchasers nor mortgagees*, and as they *had notice*, of course the assignment would not be void as to them under any statute. And as there is no proof that the purchasers from them had any notice, their title would be good under any statute. Besides, Scott did not, and having acquiesced in the sales being made, could not question their title. He would be estopped by his own acts. Besides, in claiming the proceeds, he rati-

fies the sales. It follows that the statute in question did not determine the *effect* of the sale (whatever sale he means,) and there is no such question in the case.

IV.

The other specifications in substance are, that the plaintiff, Scott, owned but an undivided half, Morrison being the owner of the other half. He does not, or at least cannot legally claim, that that would be a defense to the action under the pleadings as they are, if true, as by Sec. 144 of the New York Code of Procedure the defendant may demur to the complaint, if it appears upon the face of the complaint that there is a defect of parties plaintiff. And by Sec. 147, if the defect does not appear upon the face of the complaint, the objection may be taken by answer. And by Section 148 it is further provided that, "if no such objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same."

That the plaintiff therefore owned but an undivided half, or that another party should have been joined as plaintiff, would not have been a defence to the action if true. But it is not true, in fact. Neer owned half, and was authorized by Morrison to sell, the same as if he owned the whole, and to have all the proceeds. He sold to Scott, as he had a right to do, and Scott thus became owner of the whole. The defendants, after that—when they knew that Scott was such owner—sold rights and took the money for them. That Scott owned all of that money, and was entitled to it, if he did not repudiate the sale, is too clear for discussion. His right to the proceeds of those sales does not depend upon any section of the patent law. The well settled law in regard to agency

by ratification or adoption, waving tort and suing in assumpsit, and estoppel, is the only law in question. Enough has been said on that subject in answer to the first specification of the plaintiff in error, and need not be repeated.

V.

In his *Fourth* specification the plaintiff in error claims, or alleges that he claimed in the Court below, that the writing from Morrison to Neer, only exempted Neer from accountability to Morrison, but did not convey to Neer any interest in the patent itself. Well, suppose that to be so; what has the statute to do with that? What was sold, or granted by the writing from Morrison to Neer, depends upon the terms and construction of the contract. Even if Morrison was defendant, and made the claim, it would not bring that statute in question; much less does it come in question by the mere argument of these defendants who are not in a situation to raise such a question. or would not be if such a question could be raised by any one. It is enough that the construction of that contract brings in question no law, but the law of contracts, and that it is not a right, privilege, or immunity specially set up and claimed under the said statute.

VI.

The plaintiff in error, in his *Fifth* specification, (page 62,) alleges that he "claimed under said statute that Morrison's deed to Scott, made after Stone's said sales, only conveyed Morrison's then remaining interest in said patent," &c. To that there are these answers:

1st. That, if a question at all, was a question of

construction of the *contract*, depending entirely upon its terms and provisions, and not upon any statute.

The conveyance from Morrison to Scott was entire-immaterial and unnecessary, and was probably made from excessive caution. Neer was fully authorized to sell, when he sold to Scott in July, 1855, (pages 4, 54.) And these are answers to all else that is alleged in said fifth specification. In those respects there was no right, privilege or immunity set up, or claimed under said statute.

VII.

In his *Seventh* specification, the counsel for the plaintiff in error claims that Stone's sales made by him, as attorney for Neer, conveyed only Neer's interest, and not any that Scott had. What is stated in the preceding points fully answers this.

1st. The sales in question were made after Neer had conveyed to Scott, (pages 3, 4.) Therefore the sales were of Scott's property. Scott might have repudiated the sales, but he acquiesced in them, adopted the act, and claimed the proceeds. Neer has no right to the money, nor did he claim it, and no one but Scott could, and he was entitled to it.

2d. But whether he was entitled to the money or not, does not depend upon Sec. 11, or any other section of the patent act, nor did the State Court decide that it did; nor was it necessary for that Court to decide any such question. It was simply a question of the construction of the contract.

VIII

The same thing can be said of the claim in the 8th Specification. It is purely a question of construction

of the contracts; in no way dependant upon the provisions of Sec. 11, or any other section of the Patent Act.

There is nothing alleged or shown in the assignment of error, giving this Court jurisdiction; and the Writ of Error should be dismissed.

JAMES FLYNN,

Counsel for Deft. in Error

SUPREME COURT

OF THE

UNITED STATES.

CHARLES K. BROWN, *Survivor, &c.*,
Plaintiff in Error
vs.
FRANK S. ATWELL, *Administrator of* ISAIAH SCOTT, *deceased*,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR AGAINST MOTION TO DISMISS WRIT OF ERROR.

STATEMENT OF FACTS.

This action was brought, in New York Supreme Court, by Scott, as alleged assignee and owner of U. S. Letters Patent, against Brown & Stone, for proceeds of alleged sales by them of such Patent, after Scott became owner thereof (Complt. 1. 3.*): and these allegations were put in issue by the answer (2. 4.)

*NOTE—*References are, by the larger figures to pages of Print, and by the smaller figures to marginal, or original pages.*

Stone died, and the action was continued against Brown as survivor (**2.** 5): Scott also died, and his Administrator was substituted (**49.** 95.)

The questions of liability were tried before Referee Tabor, who (as per N. Y. practice) reported the Facts and his Law-conclusions therefrom (**3-5.**)

These questions embraced the relations *inter sese* of numerous actors, and though these are now finally settled by the State Courts, the evidence about them greatly cumbers the Record. But the primary questions, and those covered by the Assigned Errors, related (1st) to Scott's title to the Patent and (2d) to the reach of Stone's sales (so called) as embracing Scott's title; and for examining these questions, either for this motion, or on the merits, Tabor's Report furnishes ample material, with only occasional references, for greater precision, to undenied proofs.

The issue of Scott's title, at the time of the alleged sales by Stone & Brown, rested upon these proofs, viz:

1. U. S. Let. Pat., to Neer dated May 31, 1853, for improvements in fire places and stoves (**7.** 14; **3.** 5.)

2. Assignment by Neer to Morrison July 18, 1853, recorded in U. S. Pat. Office, Oct. 3, 1853 "of an undivided half of said Letters Patent" (**7.** 14; **4.** 7.)

3. A writing from Morrison to Neer, made soon after Neer's deed to him, to the effect that Neer

"could go on and manufacture and sell heaters and "rights as though he (Morrison) had no interest in "the Patent * * * and have all the proceeds" (16. 31; 4. 7.)

4. Assignment by Neer to Scott July 20, 1855, recorded July 26, 1855, of "his (Neer's) interest in said Patent" (7. 14; 4. 7: also admission 12. 24.)

And thereupon, Ref. Tabor decided that Scott was "owner of said Patent at the time said sales were made" (5. 9.) "said sales" referring to sale by Stone in fall of 1855 and March and June 1856 (3. 6.)

The question whether Stone's sales conveyed Scott's title rested upon these facts and proofs, viz:

1. Sales by Stone in 1856 of territorial rights under a Power of Attorney from Neer given October 23, 1854 (3. 6) and as such Attorney, and only of Neer's interest in the Patent (12. 24; 4. 8.) (Note—The recovery was limited to Stone's sales in 1856, relating to the New England division—46. 90—and therefore only those sales are involved.)

2. That Scott "had knowledge of these sales and did not object to them" (4. 7.); that Neer then had an unrecorded Power of Attorney from Scott to sell rights (Ibid); that Stone knew this (Ibid); that Stone's vendees, learning about their defective title, stopped using the Patent, and called on Scott for a good title, and did not get it (4. 8.); but were not, as Tabor held, "disturbed in their title to "said rights, or the use or sale thereof" (Ibid.)

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And thereupon, Ref. Tabor decided that Scott "as the owner of said Patent at the times said sales "were made, and who did not disaffirm, but on the "contrary affirmed the same" should recover the owner's customary half of the proceeds of such sales (**3.** 7. **5.** 9.)

After an accounting before Ref. Parmenter (**46.** 90) judgment was rendered upon Ref. Tabor's said decisions (**48.** 92.); and this judgment, was affirmed by N. Y. Supreme Court (**49.** 95) and again by N. Y. Court of Appeals (**53.** 103.)

A Writ of Error from this Court was then brought (**59.** 122) and Errors were assigned, (**61-2**) in substance, that the Courts below misconstrued and violated Sec. 11 of the Patent Act of 1836, and denied Brown's claims under it, in holding (1st) that Stone's sales were of Scott's rights in the Patent and (2d) that Scott was then owner of the entire Patent (**60.** 124.)

And the Def't in Error now moves to dismiss the Writ of Error for want of jurisdiction; and Plaintiff in Error presents the following Points in opposition.

POINTS.

I.

It was fundamental to Scott's recovery (1st) that he was entire owner at the time of Stone's sales; and also (2d) that those sales conveyed his title.

1. If Scott's title to the New England part passed to the grantees of Neer's interest therein, Scott

could recover for proceeds thus derived from his property; *but otherwise not.* Likewise, if his title thus disposed of was only an undivided-half, he could only recover accordingly; and his recovery for the entire owner's customary half (**3.** 7. **5.** 9), was of necessity based on an entire ownership. Therefore, the recovery rests and depends upon *both* of above conditions.

2. This is not only very evident, but is the theory of Scott's action, and the law of his recovery.

Thus, Scott's action was brought as *owner*, for sales of *his property.* His complaint was that the Patent was issued to Neer and sold by him to the plaintiff Scott; that "the same then became and has ever since been *owned by* said plaintiff" and that the defendants "having made sales of *said Patent* "while it was owned by said Neer, continued to do "so *after said transfer to said plaintiff*" (**1.** 3.)

His recovery was also on this basis—that Scott should recover for proceeds of Stone's sales "as the "owner of said Patent at the times said sales were "made, and who did not disaffirm, but on the con- "trary, affirmed the same" and whose title thus passed thereby (**5.** 9); and that he should recover the half, which was adjudged to be the *owner's share* (**3.** 7. **5.** 9.)

And this judgment that the proceeds were derived from Scott's property, was what the State Courts affirmed; and it was affirmed upon this avowed ground. Thus, says Boardman, J. (**51.** 99.) "Scott "was in fact the owner of the Patent." "The pur-

"chasers under such (Stone's) sales obtained a valid, "though not recordable title, of Scott's interest in "said Patent, and Brown & Stone, having received "the proceeds of such sales, are bound to account "to Scott, or his administrator, for the same" and then he argues "a ratification by Scott of any ille- "gal act of Stone & Brown." Likewise, says Folger, J. (**56.** 110.) "The plaintiff was estopped from as- "serting his title to the patent-right" and then after arguing that the subject of Stone's sales, was not Neer's interest in the Patent, but the territorial part of the Patent itself, says "Can it be that "Scott, thus estopped to claim the patent-right, "is not entitled to the proceeds of it? It cannot "be that he must lose *his property* to the vendees, "and also the avails of it to the defendants" and (**58.** 114.) "he being the *true owner of the property* "did stand by and knowingly suffer Stone and "Neer and Brown to sell the same, in the name of "Neer, as Neer's property, without objection. The "sale was valid against him."

Whether any theory of Scott's entire ownership, or of his title passing by his assent to sales of Neer's interest, be correct or not, is not open for discussion on this motion; and it is enough just now that the conditions above stated of title *in* and thus *from* Scott, were fundamental to Scott's recovery.

3. As Scott's entire ownership *at the time* of Stone's sales, was thus vital to his recovery, Morrison's subsequent deed to him was "immaterial" as the Brief for the motion expressly concedes (Point VI.)

Besides, as it was a necessary theory of recovery that the New England division had already passed to Stone's vendees, (so that the proceeds were of Scott's property) Morrison's deed was necessarily limited, by that hypothesis, to the other States. Therefore the remark by Folger, J. that by that deed "all Morrison's interest and Neer's interest centered "in Scott" (54. 107) was true only as to such other States; and it was as immaterial what interest Scott acquired in the Patent at that late day, as it was that on the day following, he conveyed to Hubbard & Pitman, all his interest within those other States (which on the theory of his recovery was all that remained in him), including that just derived from Morrison.

In other words, if Stone's sales were not effective, with Scott's concurrent conduct, to convey the New England part of the Patent, then Scott's property was not sold, and his judgment was erroneous; and if they were thus effective, then Morrison's deed to Scott, like Scott's to Hubbard & Pitman, only covered the remaining States.

(Note, Scott's deed to H. & P. embraced Conn. in opposition to his adjudged sale of it, by adoption, to Stone's vendees.)

4. Scott's judgment was doubly on the basis of entire ownership (1st) that he acquired full title from Neer and (2d) that full title to the New England division, passed from him by estoppel. Therefore the remark by Folger, J. (54. 107.) that "Scott "got by the paper from Morrison to Neer and by "that from Neer to him, the right to claim an ac-

"count of the whole proceeds of a sale" independently of actual title, was only in that connection and served only a temporary purpose. For, when the learned Justice came to the other question of title passing *from* Scott, he sustained a full recovery upon the basis of the judgment itself, *that full title passed from him as actual owner*, (as above citations, subd. 2, abundantly show); and thus the question of Scott's ownership, immediately recurs, as necessarily involved. Besides, the above quoted remark is based on Scott's having acquired "the right to use and *sell*" (Ibid) the Morrison half; and this question involved one of title, and equally depends upon the Patent act (vide post.)

II.

Therefore Scott's recovery involved these *questions of title* to the Letters Patent granted to Neer; (1st) whether Neer's deed to Scott assigned the entire Patent—either because his previous deed of half to Morrison, was ineffective, or because Morrison's Writing to Neer re-assigned that half, so that it passed to Scott, by Neer's subsequent deed "of his interest in the Patent" and (2d) whether yet subsequent deeds of Neer's New England interest, together with Scott's conduct relative thereto, effected an assignment of Scott's title to the New England division.

1. This Point follows directly from the preceding one; and is stated rather as leading the way to

the next one, than as a specific advance, in the line of argument.

III.

These questions of title—about Scott's full ownership, and his territorial title passing to Neer's later grantees—are reviewable by this Court; For they depend upon the Patent Act, and especially its Sec. 11, and upon the construction of that Act, as applied (1st) to Scott's proofs of full title and (2d) to his proofs that his title to the New England division passed to the grantees of Neer's interest therein.

The State Courts refused to test these questions of title by the Patent Act, and persisted in deciding them, independently of that Act, by some strange standard of their own. And likewise, this Motion is mainly put on the ground, that this local standard is the true test of these titles, and that therefore the consequent decisions are final, and not reviewable here. It thus becomes proper, or at least pardonable, to elaborate this Point considerably; and to do so notwithstanding the familiarity of this Court, with the *broad doctrine* that *the Patent-Act is the Law of Patent titles*, and the obvious application of that doctrine to this case, may well render any such detail quite unnecessary.

Accordingly, the following argument of this Point is submitted.

1. *If these questions of title depended upon the Patent Act, and involved its construction*, it cannot be doubted, that *they are reviewable here.* For Federal Acts are not to be variously interpreted, in different States, by their local standards; but are of uniform significance throughout the Union, and this Court is their final expounder.

Neither would it deprive Federal Acts of a uniform meaning, or divest this Court of its conservative jurisdiction, though it, were needed to look beyond the letter of an Act and have resort to other sources, whether cognate Acts, or common-law rules of interpretation: For this need would by no means remit its construction to State Courts, or subject it to local interpretation; and its final construction, would none the less belong to this Court, and be governed by a national standard. Thus, the construction of "instrument in writing," in Sec. 11, as including a *printed form* or excluding a transfer by *mere conduct*, cannot vary in different States, with their local standards; but belongs to this Court, and must be resolved by the use of these words in other acts, or by that general and national sense, in which Congress will be presumed to have used them.

Nor is this Court divested of this jurisdiction, because State Courts, as in this case, *ignore* the Federal Act, upon which the case depends; for such Acts are not subject to being thus *nullified.*

Nor is this jurisdiction divested, though Equity could overlook the letter of this Federal Act, and validate a transfer which is defective in Law; For

each State Court, would not therefore be free to disregard, or modify, the Act, by its own peculiar theories of Equity. But every such question, would equally be under the dominating control of this Court, and subject to final settlement, only upon principles of Equity, which are generally accepted, and belong to our national jurisprudence.

2. *These questions depend immediately upon the Patent Act;* For that Act is the Law of Patent-titles, in which every transfer must find its authority, and by which it must be tested.

In Gayler v. Wilder 10 How, U. S. Rep. 477 this precise point was presented, and it was specially urged by Mr. Webster, that an invention is property, and assignable "independently of any Statute enactment:" But this Court expressly negatived that position, saying (per Taney, Ch. J. p. 494). "The monopoly did not exist at common law, and "the rights therefore which may be exercised under "it cannot be regulated by the rules of the common "law. It is *created* by the Act of Congress, and *no* "*rights can be acquired in it unless authorized by* "*Statute, and in the manner the Statute prescribes.*" And the Court then construed Sec. 11, as authorizing assignments of a Patent, or of any undivided part, or of a territorial division, but not of a special feature, or use, of a Patent; and held that a transfer not thus authorized, does not convey *an interest in the Patent*, but is valid only as a License.

Thus, by this decision, repeatedly followed, and hitherto unchallenged, *the Patent Act is the Law of Patent-titles.* And the beneficent result has been,

1. *If these questions of title depended upon the Patent Act, and involved its construction*, it cannot be doubted, that *they are reviewable here.* For Federal Acts are not to be variously interpreted, in different States, by their local standards; but are of uniform significance throughout the Union, and this Court is their final expounder.

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and is, that all such titles are the same everywhere, and proceed from, and are governed by, one Law which pervades the Union, and is subject to final construction only by this Court. Surely, whatever be the Law, (Federal, State, Civil, Common or Statute) by which a question must be resolved, that Law, and none other is involved by such question, and is what needs to be considered and determined; and every other Law is utterly foreign and irrevelant. Thus, to say that a transfer which depends upon this Act, and is valid only as authorized thereby, is nevertheless valid if only so at Common-Law, is a *flat contradiction.*

3. The present questions of title, thus depending upon the Patent Act, *necessarily involve its construction.*

This is a mere *truism.* For any given question must depend upon, and involve its governing law, and demand a determination of what that law is on that subject; and if that law be in a definite form, as a statute is, the decision involves and *is a construction* of that law.

Thus, in this case, the questions of transfer and title depend upon the Patent Act as their law (ante. subd. 2); and a determination of these questions involves, and is, a determination *of what that Law is—a construction of the Law.*

And therefore, it appears (1st) that if the present questions of title depend upon the Patent Act and involve its construction, they are reviewable here; (2d) that these questions do depend upon

that Act, as their law; and (3d) that they involve the construction of that Act.

Note. *Collateral* questions about Patent assignments may indeed arise (ex. gr., of warranty, duress, etc.) which may be resolved by common-law standards; but not about the assignments *as such*, for in that respect, they can find their authority and law only in the Act itself.

4. This Point is further proved, by the uniform tenor of Federal decisions about Patent-titles, as thus involving the construction of the Patent Act.

The law of Patent-assignments which this Act prescribes is this; (Sec. 11) "That every patent "shall be assignable in law, either as to the whole "interest, or any undivided part thereof, by any in- "strument in writing" with a further provision that such "assignment, and also every grant and convey- "ance" of a territorial division shall be recorded in the Patent Office, within three months from the execution thereof. And brief as is this Law of Patent-titles, its construction has already been demanded, and settled, upon a great variety of questions of title that have arisen under it; and the Act has sometimes had to be construed, not merely by the letter of this Sec. 11, but by the entire Act, as its context, and by the supposed intent of the provisions in question, as thus gathered; and also, by its phraseology, as interpreted in that Congressional, or National sense, in which it was presumptively used. Thus, the Federal Courts have already construed this Sec. 11 as follows:

That it provides a Law of Assignments for the Patents created by the Act, and thus excludes unauthorized transfers, and becomes the only law of Patent titles, by which every transfer must be tested (ante).

That it authorizes assignments of the entire Patent, or of an undivided part, or of a territorial division, but not of a separate feature, or use ;

That "assignment" applies to the invention as well as the Patent, and therefore may precede actual issue of the Patent ;

That "assignment" means a written transfer of the Patent, or of an undivided part; and "grant" a written transfer of a territorial division ;

That an authorized assignment or grant is of an "interest" in the Patent ; and that any other transfer is only a License ;

That the provision for recording is only directory as between the parties ; but ensures priority to intermediate bona-fide purchasers ;

That an execution sale is not an "assignment," etc., etc.

Now all the decisions on these subjects, are obvious and avowed, *constructions* of the Patent Act ; and they became necessary, because the cases involved patent titles; and this act, as their Law, thus needed to be construed ; and this need always arises, when questioned titles appear: For every such questioned title resolves itself, at last, into a construction of this act on that subject. Indeed the profession versed in Patent matters, would not think to test a Patent-transfer, otherwise than by this act, and its settled, or probable, construction by the Federal Courts.

5. This Point is further and specifically proven by an analysis of the exact questions which this case presents as follows:

(a). As to title *in* Scott, this depends (1st) upon the deed from Neer to Morrison, being ineffective under the Patent Act, either as not an authorized "assignment" within the meaning of Sec. 11, or as not recorded in compliance with the provision on that subject, and as therefore made void against Scott: *Or*, (2d) upon the Writing from Morrison to Neer, being an "assignment," within the meaning of Sec. 11, of the Morrison half of the Patent back to Neer, so that it passed to Scott, under Neer's subseqeent deed "of his interest in the Patent."

(Note. Brown's claim was that this Writing was not such an "assignment," but only related to accountability from Neer, for his use of the Patent, and for proceeds of Licenses from him as half-owner; and did not convey any *interest in the Patent itself;* and further that though it were held to concern the Morrison half, that interest in the Patent would not pass, under Sec. 11, by an "instrument in writing" conveying only Neer's interest.)

On which of these grounds, the Courts below based Scott's adjudged ownership, does not appear; (and there does not seem any choice between them); nor is it material, for they equally involve a construction of section 11.

(b). As to title *from* Scott, it depends upon whether the "instrument in writing" which Sec. 11

intended, and should be construed to require, is an "assignment or grant" "in writing," and of an interest in the Patent, and *from the owner of that interest;* or whether, on the other hand, a grant "in writing" by *Neer* of *his* interest, with *parol* acquiescence by Scott, is an "assignment or grant" of Scott's interest, by an "instrument in writing" within Sec. 11.

And whatever may be the construction of this Sec. by this Court, upon this question, when the merits come to be considered; and whatever play may then be found for assignments by estoppel; and whatever law of estoppel, whether local or national, may then be recognized, is immaterial to this Motion: For it suffices now that the question thus presented, immediately concerns the construction of this Sec. 11, and secures the jurisdiction of this Court.

(c). That a decision of a State Court, in opposition to the Patent Act, as construed by this Court, would be subject to review and correction here, cannot be doubted; Ex. gr. a decision that a grant of a territoral division does not vest an interest in the Patent, and is only a Licence; and certainly an opposite decision that Morrison's writing (permitting Neer to go on and manufacture and sell heaters and rights) was a re-assignment of Morrison's half to Neer, is equally reviewable.

But every decision about Patent-titles, is reviewable here, not because it seems erroneous, nor because it is put on one or another ground; but be-

cause the governing Law of every such title, is the Patent Act; and because its construction is therefore immediately involved, as validating, or not, the title in question.

6. Finally, here is an Act of Congress, which prescribes what transfers may be made of the Patent it creates, and here are certain transfers written and parol; and upon this Act and these transfers, necessary questions arose, whether said Act authorized and validates such transfers as this case developed; and these questions immediately depend upon the Act, and its construction with reference thereto; and that construction belongs finally to this Court.

IV.

But though this doctrine of Gayler v. Wilder and of all the Federal decisions, referring the solution of questioned Patent-titles to the Patent Act, were now doubted; yet Brown's claim—that this Act should thus be construed to govern every such question of title, and thus as invalidating the titles now in dispute—secures the jurisdiction of this Court; and this being secured, he becomes entitled to a full hearing on the merits of this question, unless it shall be manifest that this claim is without any merits and frivolous; and no claim can be of that character, which rests on such a basis of authority as this does.

V.

Not only were these Federal questions (of Patent-transfers to and by Scott) thus necessarily involved (ante); but the Record fully shows that these questions, and Brown's Federal claims respecting them, were raised and presented, and decided against; and thus that the jurisdiction of this Court to review such decision is fully secured.

1. The Record bristles with these questions.

The suit, being for sales of a Patent sold to Scott, such sales formed its very *subject matter*—sales of a Patent, created by the Patent Act, and saleable only by virtue of it; and thus the Patent Act is an element and basis of the suit itself.

2. The Pleadings involved these questions.

Scott's complaint was for sales by the defendants of a U. S. Patent, issued to Neer and sold to Scott—of a Patent issued under the Patent Act, and for sales effectual only as authorized by that Act. Therefore, this complaint was necessarily, and in effect, though not in form, based *pro-tanto* upon the Patent-Act, as the *authority* for such transfers, and as thus immediately *constitutive* of the alleged cause of action. Accordingly the answer, by its general denial, put in issue this necessary, and constitutive authority; and thus *as to that authority* (the very subject for review by this Court) the Pleadings are in legal effect, *claims pro and con, of right and immunity, under the Patent*-Act.

3. Brown's claims under the Patent Act were

not an affirmative defence, which had to be pleaded *or could be;* but concerned the substantial sufficiency of Scott's proofs, and his recovery thereon. And the 24th exception (**43.** 84.) entitled Brown, on appeal, to present against such recovery and proofs, these involved questions under the Patent Act: But these, or any, grounds of Exception had no place in the Exception itself, and could be presented by way of argument in the Appellate Courts— Nor was there any need to present these at General Term (though this was done) but the argument there could be limited to questions of fact, which are there finally settled; and nevertheless such Exception fully entitled Brown, to present to the Court of Appeals, the Federal questions and claims, brought here for review, and to *command* their decision by that Court.

And the certificate (**58**), which forms part of the Record, fully shows that those questions and claims were thus presented, and not only that the judgment of affirmance therefore involved an adverse decision, but it specifically shows such adverse decision. And all this is familiar practice-law in New York Courts, which does not admit of question.

4. The Record thus shows (1st) that the Patent Act was a necessary basis of the suit; (2d) that these Federal questions and claims were embraced within the issues formed by the Pleadings; (3d) that they were raised by the general Exception to the recovery, (4th) that they were formally presented in due time and manner to command a decision thereon by the Court of last resort; and (5th) that such decision was made, and was against these claims;

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under the practice-law of New York, these questions were before each State Court, and necessarily involved in each successive judgment.

VI.

For the reasons above presented, this Court has jurisdiction of this case; and the Brief for Deft. in Error offers no valid argument against such jurisdiction.

1. That Brief avoids, rather than wrestles with, the vital questions (1st) whether the Patent Act is the Law of Patent-transfers, and a Federal question is therefore involved; and (2d) whether Brown's claim that the Act is such, and should be construed accordingly, and as validating the questioned transfers, does not involve the construction of the Act; and is not so serious a claim, as to call for a decision on the merits. And instead of arguing these questions, it *assumes* (Point II) that the Law of the questioned transfers, is not the Act, which alone authorized them, but some local standard of New York; and then urges the supposed *merits*, as thus erroneously tested.

2. It claims that the non-joinder of Morrison was waived; but if so, that matters nothing: For Scott and Morrison were not partners, but only tenants in common; and even though Brown, by pleading a non-joinder, could have prevented a recovery by Scott alone, but waived this; yet any idea that

Scott was therefore entitled to recover for more than a sale of his own half, is wholly inadmissible —too much so to justify refutation.

3. All other considerations suggested *for* the motion, have already been considered.

And with an apology for having elaborated so fully, several propositions which may well be very familiar ones to this Court, the foregoing Argument is very respectfully submitted.

JOHN B. GALE,
Of Counsel for Plff. in Error,
TROY, N. Y.

ADDENDA.

(1st). Being just now reminded of the tedious work, that once devolved upon me, of examining the title to lands derived through a Bankrupt's Assignee, under the old Federal Bankrupt-Law, which was before my day, and of which I knew very little; and that it involved a study of that Law and of the decisions under it, and my seeing first, that jurisdiction was acquired, and then, that the Assignee got title, and sold the lands, conformably to that Law; the following is added to—Point III.

Title to lands, or other property, from a Bankrupt to his Federal Assignee in Bankruptcy, must be derived under the Federal Bankrupt Law, and con-

formably to its provisions: And any question, about either such link of title, is an immediate question, whether the Bankrupt Law and the acts done, *together* effect a valid transfer of title—whether the Law authorizes *and* validates such a transfer as these acts present and no one would doubt that this is a Federal question, which belongs finally to this Court.

And if it be that a Patent "is created by the "Act of Congress and no rights can be acquired in "it unless authorized by Statute and in the manner "the Statute prescribes," (Gayler v. Wilder) then this example, and the case in hand, are perfectly parallel.

(2d). A suit by an Assignee in Bankruptcy, or, purchaser from him, which should include an issue, either of the title of the Assignee from the Bankrupt, or of a sale by the Assignee (under the Bankrupt Act), serves also to illustrate Point V: For it cannot be doubted that such issue would be one about the Federal Act, as a necessary and determining element of the transfers thus in issue, and that this issue therefore directly presents a Federal question; And this case is exactly like the one thus supposed.

(3d). The evident *rationale* of Gayler v. Wilder is (1st) that because the Patent Act assumes to provide for assignments of the Patents it creates, its provisions on that subject are *exclusive* (2d) that a Patent being a *monopoly and franchise* from Government, it is *personal*, save only as it is made assignable, by and under the authority of Government—by its Acts of Congress.

J. B. G.